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No.

In The

Supreme Court of the United States

October Term, 1997

McCLATCHY NEWSPAPERS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Labor Relations Board may deprive an employer of a legitimate economic weapon in collective bargaining — implementation after a bargaining impasse — based solely upon the content of a lawful wage proposal?

STATEMENT OF INTERESTED PARTIES

Petitioner, the petitioner below in these two consolidated cases, is McClatchy Newspapers, Inc.. McClatchy Newspapers, Inc. is the publisher of *The Sacramento Bee* and *The Modesto Bee*, daily newspapers located in Sacramento, California and Modesto, California respectively.

Respondent, the respondent below in both cases, is the National Labor Relations Board.

Intervenor in both cases below was Northern California Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, CLC.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner advises the Court that on March 19, 1998, it will become a wholly-owned subsidiary of McClatchy Company.

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In these two consolidated cases, McClatchy Newspapers, Inc. ("McClatchy or "Company") respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit enforcing the order of the National Labor Relations Board ("NLRB" or "Board") in one of the cases, and partially enforcing the Board's order in the other case.

OPINIONS BELOW

The District of Columbia Circuit's opinion *McClatchy Newspapers, Inc. v. NLRB* (*"McClatchy II"*), App. 1a-24a, is reported at 131 F.3d 1026 (D.C. Cir. 1997). The decision and order of the NLRB in Case No. 32-CA-11228, *McClatchy Newspapers, Inc., Publisher of The Modesto Bee* (*"McClatchy (Modesto)"*), App. 25a-45a, is reported at 322 NLRB 812 (1996). The supplemental decision and order of the NLRB in Case No. 20-CA-21429, *McClatchy Newspapers, Inc., Publisher of The Sacramento Bee* (*"McClatchy (Sacramento)"*), App. 46a-71a, is reported at 321 NLRB 1386 (1996). The District of Columbia Circuit's opinion *NLRB v. McClatchy Newspapers, Inc.* (*"McClatchy I"*), App. 72a-135a, denying enforcement to the NLRB's original decision and order in the *McClatchy (Sacramento)* case, and remanding the case to the Board for further consideration, is reported at 964 F.2d 1153 (D.C. Cir. 1992). The NLRB's original decision and order in the *McClatchy (Sacramento)* case, App. 136a-164a, is reported at 299 NLRB 1045 (1990).

STATEMENT OF JURISDICTION

The District of Columbia Circuit enforced the NLRB's *McClatchy (Sacramento)* order, and partially enforced the NLRB's *McClatchy (Modesto)* order, on December 19, 1997. App. 2a. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.)* ("NLRA" or "Act"), provide in relevant part:

> It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the NLRA provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concessions[.]

STATEMENT OF THE CASE

A. Introduction

Whether an employer may implement a "broad[ly] discretionary" wage proposal following good-faith bargaining to impasse "reach[es] to the heart of labor law" and "occupies a space between several well-established doctrines of labor law." *McClatchy I*, 964 F.2d at 1154 (Statement of Edwards, J.). App. 75a. The NLRB's assumption of authority to deny employers such freedom involves "a major change in the law . . . that is in some tension with other important doctrines." *Id.* at 1178 (Statement of Silberman, J.). App. 132a. The decision below, which allows the Board to distinguish among lawful economic proposals to condition post-impasse implementation upon an employer's offering fixed as opposed to flexible wage terms, is in conflict with the holding of the United States Court of Appeals for the Tenth Circuit, and permits the Board to "mov[e] 'into a new area of regulation which Congress had not committed to it.' " *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (quoting *Insurance Agents' International Union, AFL-CIO v. NLRB*, 361 U.S. 477, 499 (1960)) ("*Insurance Agents*").

B. Facts

These consolidated cases arise from separate collective bargaining negotiations between McClatchy and Northern California Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, CLC ("Guild") at *The Sacramento Bee* and at *The Modesto Bee*.

1. The Sacramento Bee

McClatchy publishes *The Sacramento Bee*, a daily newspaper located in Sacramento, California. The Guild is the bargaining representative for several hundred of the

Newspaper's editorial, advertising, and telephone switchboard employees. App. 2a.

The parties' expired collective bargaining agreement determined wages through a combination of pay scales and discretionary merit raises. Once an employee reached the maximum wage step for his or her classification, raises were based solely on merit, as determined by the Company. *Id.*

During negotiations for a new contract, McClatchy and the Guild took conflicting positions in their wage proposals. The Guild sought fixed wage increases and an elimination of merit pay. McClatchy pursued a compensation system based on guaranteed minimum rates, with increases over the minimums dependent upon management's determination of employee merit.[1] App. 3a. After bargaining in good faith to impasse, McClatchy implemented its wage proposal and gave merit raises. *Id.*[2]

2. *The Modesto Bee*

McClatchy also is the publisher of *The Modesto Bee*, a daily newspaper located in Modesto, California. McClatchy's negotiations with the Guild deadlocked over management's

1. Current employees earning less than their classification's maximum rate would be allowed to progress through experience-based steps to the maximum set by the expired collective bargaining agreement under McClatchy's proposal.

2. The Company's final proposal also would carry over the procedures for the merit pay system from the prior agreement. Under these procedures, while merit pay decisions were excluded from the grievance and arbitration procedure, McClatchy gave the Guild notice of the merit pay determination, the Guild could make nonbinding recommendations, and with employee consent could participate in the appeals process. Further, there would be no reduction of merit wages. App. 50a-51a.

wage proposal. App. 4a.[3] The Company's proposal was substantially similar to the one it made at *The Sacramento Bee*, except that it fixed the timing of wage increases. Increases would be tied to the annual review process. *Id.* Following a good-faith impasse in bargaining, McClatchy implemented its final offer and gave merit raises. *Id.*

C. Proceedings Below

In the *McClatchy (Sacramento)* case, an Administrative Law Judge ("ALJ") of the NLRB found that McClatchy violated Sections 8(a)(5) and 8(a)(1) of the NLRA by implementing its wage proposal in the absence of a bargaining impasse. The ALJ also determined that McClatchy committed an unfair labor practice by insisting on inclusion of a permissive subject of bargaining, i.e., a wage proposal for discretionary merit pay, as a condition of entering into any agreement. App. 159a.

The Board reversed the ALJ's finding that the Company unlawfully implemented its wage proposal prior to a bargaining impasse. App. 136a. However, on different grounds than the ALJ, the NLRB concluded that McClatchy violated Sections 8(a)(5) and 8(a)(1) of the NLRA.

Relying on its decision in *Colorado-Ute Elec. Ass'n*, 295 NLRB 607 (1989) ("*Colorado-Ute*"), *enf. denied*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992), the NLRB held that, contrary to the ALJ's determination, "merit pay is a mandatory bargaining subject on which a party may lawfully insist to impasse." *McClatchy (Sacramento)*, 299 NLRB 1045, 1046 (1990) (footnote omitted). App. 140a. McClatchy maintained that, since the NLRB found the parties

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3. The parties' expired contract also contained provisions for merit pay. App. 37a.

had reached a bargaining impasse, it was privileged to implement its merit pay proposal. The Board rejected the Company's contention, finding that McClatchy's wage proposal "was in reality seeking the Union's waiver of its statutory right to be consulted over those matters under Section 8(a)(5) and (1) of the Act." *Id.* at 1046. App. 141a.

The NLRB petitioned the District of Columbia Circuit for enforcement of its order, which was denied. *See McClatchy I.* App. 74a-135a. The majority of the *McClatchy I* court, in a *per curiam* opinion, held that the Board's decision did not constitute reasoned decisionmaking. The panel members each wrote separate statements. Judge Henderson agreed with the view of the Tenth Circuit, in *Colorado-Ute, supra,* that the NLRB could not square its "waiver" theory with governing precedent under the NLRA. Judge Silberman thought that the Board's waiver theory could constitute a legitimate interpretation of the NLRA if adequately explained. Judge Edwards[4] believed that the waiver theory was untenable, but that the NLRB might be able to articulate a limited exception to the "impasse doctrine" covering the instant situation. Judge Edwards and Judge Silberman agreed to remand the case to the Board for further consideration; Judge Henderson would have denied enforcement.

On remand, the NLRB did not "explain[ ] and justif[y] further" its waiver theory, *McClatchy I,* 964 F.2d at 1178 (Statement of Silberman, J.). App. 132a. Rather, the Board adopted a new rationale that post-impasse implementation of a discretionary merit pay proposal "would be so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining."

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4. Judge Edwards subsequently has become Chief Judge of the District of Columbia Circuit.

McClatchy (Sacramento), 321 NLRB 1386, 1390-1391 (1996) (footnote omitted) (emphasis in original). App. 62a-63a.

Member Cohen dissented from the Board's 2-1 decision, maintaining that "[t]he rule regarding implementation after impasse is grounded in the statute and in sound public policy. Since the employer has satisfied its bargaining obligation (by bargaining to impasse), there is no statutory impediment to employer action. . . . In addition, the freedom to make post-impasse changes is a legal weapon that can be used in bargaining, just as a strike and lockout can be used as weapons. Such weapons are an important part of the bargaining process, and the Board is not to be the arbiter of their use." *Id.* at 1392 (Member Cohen dissenting) (footnotes omitted). App. 69a-70a.

In the *McClatchy* (*Modesto*) case, the NLRB similarly challenged McClatchy's implementation of the merit pay provisions of its final offer following a bargaining impasse in negotiations with the Guild.[5] The ALJ, applying the Board's waiver theory in its original *McClatchy* (*Sacramento*) decision, found that McClatchy's implementation of its wage proposal was an unfair labor practice. The NLRB adopted the ALJ's findings on the merit pay issue, while holding that it "is controlled by the Board's [supplemental] decision in [*McClatchy* (*Sacramento*)]." *McClatchy* (*Modesto*), 322 NLRB 812, 813 (1996).[6] App. 28a.

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5. The NLRB also determined in the *McClatchy* (*Modesto*) case that McClatchy committed an unfair labor practice by threatening employees with discharge when it posted its final offer, which contained a no-strike/no-picketing clause. 322 NLRB at 817. App. 44a. In *McClatchy II*, the District of Columbia Circuit denied enforcement of the Board's order with respect to this finding. 131 F.3d at 1036. App. 24a. This Petition does not encompass such denial.

6. The NLRB "acknowledge[d] that [McClatchy] here did (Cont'd)

Following cross-petitions for enforcement and review, the *McClatchy (Sacramento)* and the *McClatchy (Modesto)* cases were consolidated before the District of Columbia Circuit. On December 19, 1997, the District of Columbia Circuit enforced the NLRB's supplemental order in the *McClatchy (Sacramento)* case, and enforced the Board's order in the *McClatchy (Modesto)* case in part pertinent to this Petition. App. 29a.

The District of Columbia Circuit, in *McClatchy II,* found that "[t]he NLRA is wholly silent on the question whether an employer may implement its final offer after impasse." *McClatchy II,* 131 F.3d 1026, 1030 (D.C. Cir. 1997). App. 9a. Moreover, it concluded that "the Supreme Court, while it has recognized the Board's doctrine, has never held that an employer has the *right* under the statute to implement its final offer, let alone considered whether the Board is entitled to craft exceptions to this supposed right." *Id.* (emphasis in original). App.9a.

The *McClatchy II* court went on to address the tension between this Court's decisions in *Insurance Agents,* "which forbids the Board to act 'as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands[,]' " and *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404 (1982) *("Bonanno Linen"),* in which the Court "emphasized that the Board has wide latitude

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(Cont'd)
propose and bargain to impasse over a defined element of its discretionary merit pay proposal — the timing of a wage increase." *McClatchy (Modesto),* 322 NLRB at 813 n. 4. App. 28a-29a. However, the Board "note[d] the integrated nature of the procedures and criteria relevant to a merit pay proposal such as the Respondent's, and the limited, independent significance of the timing component in the context of the proposal. Thus, . . . negotiation of this substantive element to impasse does not diminish the unfair labor practice committed here." *Id.* App. 29a.

to monitor the bargaining process." *McClatchy II*, 131 F.3d at 1031. App. 11a. Interpreting *Bonanno Linen*, the court concluded that the NLRB could condition post-impasse implementation on McClatchy's offering the Guild fixed wage criteria, even after it had bargained to impasse over flexible wage terms, as part of regulating the bargaining process. *Id.*, at 1031-1032. App. 13-15a.[7]

The court rejected the Company's argument that the Board's decision is inconsistent with this Court's decision in *NLRB v. American National Insurance*, 343 U.S. 395, 404 (1952) (*"American National Insurance"*), in which "[t]he Court there said that the Board is not entitled to 'sit in judgment upon the substantive terms of collective bargaining agreements' " by finding a failure to bargain in good faith based solely on the content of an employer's proposal. *McClatchy II*, 131 F.3d at 1033. App. 17a.

McClatchy further asserted that if an employer cannot implement its wage proposal following good-faith bargaining to impasse, then the union has a permanent "veto" over wages by withholding its consent. *Id.* App. 17a. The *McClatchy II* court indicated that "[p]etitioner's argument has a good deal of force, but it does not quite carry the day.", *Id.* at 1034. App. 17a. In this regard, the court observed that

> [a]dmittedly, an employer in this situation is somewhat 'stuck' on its wage proposal .... It is

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7. The court also took note of the NLRB's reasoning that implementation "disparaged" the union by excluding it from the process by which individual rates of pay are set. In this regard, the court suggested the Board was echoing concerns expressed by now-Chief Judge Edwards in *McClatchy I* that implementation could be seen as seeking "decollectivization" of bargaining. *McClatchy II*, 131 F.3d at 1033. App. 15a.

> important to recognize, however, that the Board's decision does not prevent an employer from implementing a merit pay proposal postimpasse — so long as the proposal defines 'merit' with objective criteria.

Id. (internal citation omitted). App. 18a.

The court acknowledged that "[t]he Tenth Circuit, in *Colorado-Ute,* strongly suggests a contrary view. Relying on *American National Insurance, Colorado-Ute* said that the employer had a 'right' to use the 'economic weapon of implementing at impasse' and that 'this right exists irrespective of the parties' bargaining positions.' " *Id.* (citation omitted). App. 19a.

Finally, the *McClatchy II* court rejected McClatchy's contention that "the Board has not explained adequately why it is making an exception for a proposal that affords an employer complete discretion over the grounds for and timing of wage increases." *Id.* at 1035. App. 19-20a. "Admittedly, the Board's explanation as to why wages would be treated differently . . . is hardly a full one; it is surely not as extensive as the judges on the prior panel had wished." *Id.* App. 20a. Nevertheless, the court thought "the Board is free to draw on its expertise to determine that wages are typically of paramount importance in collective bargaining . . . [.]" *Id.* (footnote omitted). App. 21a. The court also concluded that the NLRB "has the authority to decide that having fixed standards as well as fixed timing for considering raises is necessary if an employer wishes to implement its proposal[,]" finding "no fault with the Board's decision to treat the Modesto and Sacramento proposals identically, even though Modesto had fixed timing." *Id.* n. 8. App. 21a.

REASONS FOR GRANTING THE WRIT

This Court's interpretation of the NLRA's statutory framework holds that Congress sought to prevent the NLRB from passing upon the desirability of the substantive terms of labor agreements. Likewise, the NLRA does not compel any agreement or concession in collective bargaining, and the Board may not, either directly or indirectly, regulate the choice of economic weapons based solely upon the content of a lawful wage proposal.

For this reason, whether an employer advances in negotiations fixed standards for wages or, instead, a proposal reserving to management the flexibility to determine compensation based upon individual merit, is an issue to be determined by collective bargaining, not by the NLRB. The role of the Board is limited to determining whether the parties have negotiated in good faith. In this regard, if an employer has bargained in good faith to impasse over wages, the NLRA does not restrict implementation of the employer's proposal. Congress did not authorize the NLRB to decide, based upon its predilections concerning an employer's wage proposal, whether the employer is free to act after good-faith bargaining has reached impasse.

The decision below, which concludes that the NLRB may condition implementation on an employer's offering fixed rather than flexible wage terms, conflicts with the holding of the Tenth Circuit in *Colorado-Ute, supra.* In an apologia contained at the conclusion of its *McClatchy II* decision, the District of Columbia Circuit explained:

> This case presents a difficult question because of the tension between the Supreme Court decisions bearing on the Board's limited exception to the

> post-impasse rule. We certainly understand how Board members can come to different conclusions[.] . . . The question is even more difficult for us as a reviewing court, and we are obliged to admit that we are unsure ourselves as to the right answer.

McClatchy II, 131 F.3d at 1036. App 24a. The Court should exercise its supervisory jurisdiction to answer the question presented by this Petition, which "reach[es] to the heart of labor law." *McClatchy I*, 964 F.2d at 1154 (Statement of Edwards, J.). App. 75a.

I.

THERE IS A CONFLICT BETWEEN THE CIRCUITS OVER WHETHER THE NLRB CAN CONDITION AN EMPLOYER'S POST-IMPASSE IMPLEMENTATION RIGHT SOLELY UPON THE CONTENT OF A LAWFUL WAGE PROPOSAL.

In *Colorado-Ute, supra*, the Tenth Circuit faced the identical question of whether the NLRA permits the Board to condition post-impasse implementation of a wage proposal on an employer's offering fixed wage terms rather than discretionary merit pay. In a decision in conflict with that of the District of Columbia Circuit in *McClatchy II*, the Tenth Circuit concluded that regulation of post-impasse implementation based solely upon the content of the employer's wage proposal is "fundamentally inconsistent with the Act." 939 F.2d at 1205.[8]

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8. Although the NLRB's decision in *Colorado-Ute, supra* was based upon its "waiver" theory rather than the "inherently destructive" theory adopted by the Board below, this distinction is insignificant given the Tenth Circuit's holding that post-impasse implementation is a right inherent in the statute.

The District of Columbia Circuit concluded that an employer has *no established right* under the NLRA to implement its final proposal after an impasse in bargaining. *McClatchy II*, 131 F.3d at 1030, 1032-1033. App. 9a, 13a-15a. In contrast, the Tenth Circuit held that an employer has the *right*, based principally upon Section 8(d) of the NLRA, to "us[e] its economic weapon of implementing at impasse." 939 F.2d at 1404. According to the Tenth Circuit, Section 8(d) of the NLRA underscores that an employer "is not compelled to agree to the union's wage terms." In this regard, an employer may exercise the right to implement a merit pay proposal if good-faith bargaining has reached impasse. 939 F.2d at 1404.

It is important for this Court to resolve this conflict between the Circuits. The economic weapon of post-impasse implementation, either in its use or in its being held in reserve, is a factor in every collective bargaining negotiation.

The Tenth Circuit correctly held that post-impasse implementation is a *right* emanating from the framework of the NLRA rather than a mere instrument of the NLRB's authority. As the Solicitor General recently argued to this Court: "[a]fter impasse . . . 'employers no longer have a duty under the labor laws to maintain the status quo[.]' " *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S. Ct. 2116, 2124 (1996) ("*Brown*") (quoting Brief for United States, *et al.* as Amici Curiae 17). *See also Laborers Health Fund and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 543 n. 5 (1988) ("If the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during postcontract negotiations . . . would end.") (citing, *e.g.*, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)). There is no statutory impediment for an employer, which has bargained in good faith to impasse, to depart from the status quo thereafter consistent with its final

offer. Moreover, it would be improper for the Board to influence (or effect) the substance of collective bargaining through regulation of (*i.e.*, granting or withholding) economic force. *See* Section III, *infra.*

This Court has long recognized that the NLRA "does not compel agreements between employers and employees. It does not compel any agreement whatsoever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' " *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 678, n. 16 (1981) (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937)). The contrary holding of the District of Columbia Circuit removes an employer's freedom to implement its proposal for flexible wage terms, despite having bargained in good faith to impasse.

II.

THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S PRONOUNCEMENTS ON THE NLRB'S LIMITED ROLE IN REGULATING COLLECTIVE BARGAINING.

A. The Conflict With *American National Insurance* and *Insurance Agents.*

More than 45 years ago, in *American National Insurance, supra,* this Court concluded that whether an employer must agree to include in any labor agreement provisions establishing fixed standards for "any . . . condition of employment. . . . is an issue for determination across the bargaining table, not by the Board." 343 U.S. at 408-09. "[N]o principle of labor law prohibits '[b]argaining for . . . flexible treatment' and requires instead that, for each working condition, the employer 'agre[e] to freeze a standard into a contract.' " *Consolidated Rail Corp.*

v. Railway Labor Executives' Assoc., 491 U.S. 299, 308-09 (1989) (quoting *American National Insurance*, 343 U.S. at 408).

Eight years after its decision in *American National Insurance*, in *Insurance Agents*, this Court instructed that the Board should not function as an arbiter of the sort of economic weapons the parties could use in seeking to gain acceptance of their bargaining demands. 361 U.S. at 497-98. Because the NLRB is afforded no authority over the results of collective bargaining, and may not impel settlement, Congress envisioned that the use of economic pressure by labor and management in support of their positions would be an integral part of the bargaining process. "The presence of economic weapons in reserve, and their actual use on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Insurance Agents*, 361 U.S. at 489.[9] An employer's implementation of "changes that are reasonably comprehended within [its] pre-impasse proposals," *see Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *aff'd sub nom., American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), is a lawful form of economic pressure after good-faith bargaining has reached the point of impasse. "[I]mpasse and an accompanying implementation of proposals constitute an integral part of the bargaining process." *Brown*, 116 S.Ct. at 2121.

Contrary to these precedents, the District of Columbia Circuit holds that "the Board has the authority to decide that

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9. *See also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 615 (1986) ("The parties' resort to economic pressure was a legitimate part of their collective-bargaining process.") (citation omitted); *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 109 (1970) (*"H.K Porter"*) ("It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining.").

having fixed standards as well as fixed timing for considering raises is necessary if an employer wishes to implement its proposal." *McClatchy II*, 131 F.3d at 1035. App. 21a. This holding is at odds with this Court's authoritative interpretation of the NLRA.

B. The District Of Columbia Circuit's Improper Extension Of The NLRB's Authority Through Its Misapplication of *Bonanno Linen*.

In *Bonanno Linen*, "the Court upheld the Board's determination that an impasse in negotiations would not justify a single employer's withdrawal from a multiemployer bargaining unit, even if that employer were the target of a whip-saw strike by the union. The Court deferred to the Board's view that permitting withdrawal, absent extraordinary circumstances, would damage the process of multiemployer bargaining." *McClatchy I*, 964 F.2d at 1171 (Statement of Edwards, J.). App. 115a.

In *McClatchy II*, the District of Columbia Circuit found *Bonanno Linen* to have sanctioned comprehensive authority for the Board to balance " 'conflicting legitimate interests' " in overseeing the collective bargaining process, and to assess "the significance of impasse and dynamics of collective bargainings.]" *Bonanno Linen*, 454 U.S. at 413 (quoted in *McClatchy II*, 131 F.3d at 1032 (citation and emphasis in original omitted)). App. 14a. On this basis, the court held that NLRB may "as in *Bonanno Linen*, den[y] the employer a particular economic tactic for the sake of preserving the stability of the collective bargaining process." *McClatchy II*, 131 F.3d at 1032. App. 13a.[10]

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10. The District of Columbia Circuit's overarching conclusion that the NLRB may "balance" an employer's right to implement its (Cont'd)

In passing the Labor Management Relations Act of 1947, Congress chose not to enact any legislation regulating multiemployer bargaining. "Congress' refusal to intervene indicated that it intended to leave to the Board's specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining." *Bonanno Linen*, 454 U.S. at 409. In contrast, Congress amended the NLRA in 1947 through Section 8(d) to ensure Board non-interference with the substance of collective bargaining.[11]

A critical — indeed, dispositive — difference between *Bonanno Linen* and the NLRB's treatment of flexible, merit-based wage proposals herein is that *Bonanno Linen* was decided without regard to the *substance* of the parties' negotiations. The decision in *Bonanno Linen* was content neutral — the Board regulated the collective bargaining *process* by precluding withdrawal from a multiemployer bargaining unit upon impasse;

(Cont'd)
final proposal against some allegedly countervailing interest is novel and contrary to Congressional intent. Congress deliberately balanced such interests otherwise by proscribing the Board's direct or indirect regulation of "the substantive solutions" of collective bargaining "under the guise of determining good or bad faith in negotiations[.]" *Insurance Agents*, 361 U.S. at 488, 490. *See, e.g., Bonanno Linen*, 454 U.S. at 418 ("We agree that the National Labor Relations Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' ") (quoting *Insurance Agents*, 361 U.S. at 497).

11. Indeed, in *Bonanno Linen, supra*, the NLRB explicitly acknowledged that its rule therein was to have no effect on post-impasse implementation rights: "[t]he Board . . . points out that the employer can . . . make unilateral changes in working conditions if they are consistent with the offers the union has rejected." 454 U.S. at 415 n. 9.

the terms which the employer was seeking were not a consideration. Rather, the Court found that where an employer *consents* to negotiate in the specialized mode of multiemployer bargaining, a subsequent impasse does not vitiate that consent. In this vein, Justice Stevens' separate opinion concurring with the 5-4 majority underscored that the Court's holding in *Bonanno Linen* "does not impair an employer's freedom to structure the manner in which it will conduct collective bargaining." *Id.* at 429 (Stevens, J. concurring). Here, however, the NLRB, under the guise of process, in fact regulates *substance* — distinguishing among admittedly lawful wage proposals, based upon their content, to deny use of a post-impasse economic weapon. The District of Columbia Circuit extends *Bonanno Linen* beyond its moorings in an ill-conceived attempt to sanction this newly-crafted exception to an employer's post-impasse implementation right.[12]

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12. In this regard, the *McClatchy II* court concedes that "[o]f course, if relative bargaining strength were not a matter that the Board could consider in determining whether petitioner's action furthered the collective bargaining process, the Board's reasoning would be vulnerable. But that is not how we read *Bonanno Linen.*" *McClatchy II,* 131 F.3d at 1033. App. 14a-15a. Congress made clear, however, through the passage of Section 8(d) of the NLRA, that deliberately weighing relative bargaining strength so as to influence the outcome of negotiations is precisely what the NLRB may *not* do.

III.

WHETHER THE NLRB MAY CONDITION THE USE OF AN ECONOMIC WEAPON SOLELY UPON THE CONTENT OF A LAWFUL WAGE PROPOSAL IS AN IMPORTANT ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT.

A. By Directing An Employer To Offer Fixed As Opposed To Flexible Wage Terms As A Condition For Post-Impasse Implementation, The NLRB Frustrates The Plain Intent Of Congress.

The theory of collective bargaining under the NLRA has been stated authoritatively by this Court on several occasions. *See, e.g., H.K. Porter,* 397 U.S. at 103-09.

> [T]he fundamental premise on which the Act is based — [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id., 397 U.S. at 108.

By amending the NLRA through Section 8(d), Congress acted broadly to proscribe any direct or indirect regulation by the NLRB of the substantive terms of collective bargaining.[13]

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13. Section 8(d) was added to the NLRA precisely because Congress determined that the Board "has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . . [U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process (Cont'd)

See, e.g., Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 219 (1979) ("And to make crystal clear the intention to leave the parties *entirely free* of *any* Government compulsion to agree to a proposal, or even reach an agreement, Congress added § 8(d) . . . [.]") (emphasis added); *Insurance Agents*, 361 U.S. at 486-87 ("[I]t remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements."); *American National Insurance*, 343 U.S. at 404 ("[I]t is . . . clear that Board may not, *either directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.") (emphasis added). Where, as here, the NLRB concludes that a particular wage proposal confers sufficiently "broad" discretion to an employer to deny post-impasse implementation, the Board "exercise[s] considerable influence upon the substantive terms which the parties contract[ ]" *Insurance Agents*, 361 U.S. at 490, by barring implementation unless it is satisfied the parties have negotiated to impasse over " 'definable objective procedures and criteria' " for merit determinations.[14] *McClatchy (Modesto)*,

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(Cont'd)
still further and seek to control more and more the terms of collective-bargaining agreements." *H.K Porter*, 397 U.S. at 105-06 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 19-20 (1947)) (footnote omitted).

14. While this Court has recognized certain "categorical" exceptions to an employer's post-impasse implementation right, none have intruded upon the bargaining process through such a dynamic. Consistent with the labor laws, the only exceptions to an employer's post-impasse right to implement its final offer approved by this Court have involved a particularized "statutorily guaranteed right" or are "statutorily dependent upon an existing collective bargaining agreement." *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). "Insofar as dues check-off and union security
(Cont'd)

322 NLRB at 513. App. 28a (quoting *McClatchy (Sacramento)*, 321 NLRB at 1391. App. 64a).

B. The NLRB's Standard For Denying An Employer's Post-Impasse Implementation Right Is Not Entitled to Deference.

Courts must defer to the requirements imposed by the NLRB if they are "rational and consistent with the Act," *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987), and if the Board's "explication is not inadequate, irrational or arbitrary," *see, e.g., NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Here, the NLRB carves an exception to an employer's post-impasse implementation right for a discretionary merit pay proposal because it is "*inherently* destructive" of collective bargaining. *McClatchy (Sacramento)*, 321 NLRB at 1391 (emphasis in original). App. 63a.

(Cont'd)
clauses are exceptions to the postimpasse rule . . . it is not because the Board has authority to treat them as such; rather the NLRA requires that these clauses be exceptions, because they are legal only if authorized by a collective bargaining agreement." *McClatchy II*, 131 F.3d at 1030. App. 9a-10a. *See also* 29 U.S.C. § 158(a)(3) (union security conditioned upon agreement of the parties); 29 U.S.C. § 186(c)(4) (dues check-off valid only until termination date of agreement). Further, "in recognition of the statutory right to strike," an employer may not implement no-strike provisions "except to the extent other dispute resolution methods survive expiration of the agreement[.]" *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) ("*Litton*") (citing 29 U.S.C. §§ 158(d)(4), 163) (union's statutory right to strike). Moreover, the exclusion of arbitration clauses from employer implementation "appears to rest not so much on a Board-crafted exception to the post-impasse rule, but rather on general principles of contract interpretation under § 301 of the Labor Management Relations Act." *McClatchy II*, 131 F.3d at 1030 (citing *Litton*, 501 U.S. at 203-04). App. 10a. In contrast, "[t]here is no comparable statutory right to be paid pursuant to a 'fixed-rate' as opposed to a 'merit' pay system." *McClatchy I*, 964 F.2d at 1167 n.6 (Statement of Edwards, J.). App.106a-107a.

The NLRB's "inherently destructive" standard, as approved by the District of Columbia Circuit, does not constitute reasoned decisionmaking. Since there is no statutory impediment under the NLRA to post-impasse implementation of a lawful wage proposal, if the NLRB determines that an employer has bargained in good faith to impasse, it cannot be "inherently destructive" to collective bargaining to implement such a proposal.[15] As the Board itself recognized in *McClatchy (Sacramento)*, "*a bad-faith refusal to bargain may not be based solely on the substantive content of an employer's bargaining proposals*[.]" *Id.* at 1390 (emphasis added). App. 61a.

Moreover, the NLRB offers no legitimate explanation for treating flexible wage proposals differently than other proposals for managerial flexibility which an employer may implement after a bargaining impasse, such as subcontracting, plant relocation, and employee discipline. Such proposals may have an equal, if not greater impact, on individual employees and the bargaining unit, than merit pay.[16] Thus, the Board's reasoning is neither rational nor consistent with the NLRA.

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15. In *Colorado-Ute, supra,* the Tenth Circuit concluded that "consistent with the NLRA, the NLRB should have used good faith bargaining requirements as a statutory check in this case. Good faith bargaining requirements ensure that an employer will not simply 'go through the motions' of discussing wage proposals and then take unilateral action by implementing its own terms." 939 F.2d at 1405 (citations omitted).

16. The NLRB cites no case support for the proposition that Congress intended "wages," or any other subject for negotiations, to give rise to a different good-faith bargaining obligation under Section 8(d) of the NLRA. *See McClatchy (Sacramento),* 321 NLRB at 1391 n. 22. App. 64a. This Court has long recognized three categories of bargaining subjects: mandatory (including "wages"), permissive, and illegal. *See NLRB v. Wooster Div. of Borg-Warner*

(Cont'd)

CONCLUSION

An employer's freedom to implement its final proposal after good-faith bargaining has reached impasse arises from the statutory framework of the NLRA. Here, the NLRB seeks to influence the substantive terms of collective bargaining by restricting post-impasse changes to fixed rather than flexible wage terms. In endorsing this unprecedented extension of Board authority, the District of Columbia Circuit purports to rely on this Court's interpretation of the NLRA, while confessing doubt as to the right answer. The decision below frustrates the intent of Congress and cannot be reconciled with that of the Tenth Circuit in *Colorado-Ute, supra,* leaving collective bargaining participants facing uncertainty over matters that go to the heart of labor law. Because of the importance of the question presented by this Petition, this Court should exercise its supervisory jurisdiction.

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Corp., 356 U.S. 342, 349 (1958) ("*Borg-Warner*"). In *Borg-Warner,* this Court indicated that the duty to bargain is uniform among mandatory subjects. "The duty is limited to those subjects and *within that area* neither party is legally obligated to yield." *Id.* (emphasis added). The Board's singular treatment of wages is unprecedented and inconsistent with the NLRA.

Respectfully submitted,

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March 1998

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED DECEMBER 19, 1997

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 16, 1997 Decided December 19, 1997

No. 96-1399

McCLATCHY NEWSPAPERS, INC.,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

NORTHERN CALIFORNIA NEWSPAPER GUILD, LOCAL 52,

INTERVENOR

Consolidated with
No. 97-1111

On Petitions for Review and Cross-Applications
for Enforcement of Orders of the
National Labor Relations Board

* * *

Appendix A

Before: SILBERMAN, ROGERS, and GARLAND, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This dispute encompasses two cases, one involving McClatchy's Sacramento newspaper and the other its Modesto newspaper. In both cases, the National Labor Relations Board found that McClatchy committed an unfair labor practice by unilaterally implementing a discretionary merit pay proposal, even though McClatchy had bargained to impasse over the proposal with the union. In the Modesto case, the Board also found that McClatchy had threatened its employees with discharge for engaging in a protected activity. McClatchy petitions for review of the orders, and the Board cross-petitions for enforcement. We enforce the Board's Sacramento order, and partially enforce the Board's Modesto order.

I.

At the Sacramento Bee, the Northern California Newspaper Guild, Local 52 represents editorial, advertising, and telephone switchboard employees. McClatchy's most recent collective bargaining agreement with the union, which expired in 1986, set pay through a combination of wage scales and discretionary merit raises. The agreement defined 28 job classifications, each setting a minimum salary that automatically increased with each year of experience. Once an employee reached the maximum salary for his or her classification, raises were based solely on merit, as determined by the company. McClatchy retained full discretion over the timing and amount of these merit raises, and its decisions were excluded from the contractual grievance and

arbitration procedure. Within 10 days of performing a merit evaluation, McClatchy would notify the union of the result, and the union then could make nonbinding comments and participate in the appeals process at the employee's request.

When the 1986 agreement expired, McClatchy and the union each proposed a new wage system. From the outset, their proposals were diametrically opposed: McClatchy wanted to move to a system based entirely on its determination of merit; the union wanted to eliminate the merit system altogether. McClatchy's final offer proposed to grandfather current employees earning less than their classification's maximum, but this plan only superficially preserved the old wage scales. Ninety percent of the employees were already at the top salary step in their class, so the offer kept most raises in McClatchy's complete discretion. And, since the 1986 scales were out of step with the cost of living, salaries for the remaining 10% would effectively be determined by the publisher's discretion as well.

The parties bargained in good faith, but ultimately deadlocked over wage terms for the new agreement. Following impasse, McClatchy asserted that it was implementing its final offer and began granting increases to employees without consulting the union. Under the terms of McClatchy's proposal—as was true under the 1986 agreement—the union's role was restricted to making nonbinding comments and participating in the appeal process only if asked by the employee. The union filed an unfair labor practice charge against McClatchy, alleging that implementing "merit" increases without the union's consent violated McClatchy's duty to bargain with the union over wages.

Before the Board resolved the union's Sacramento complaint, petitioner reached an impasse with the union over a

similar discretionary pay proposal for its Modesto Bee editorial staff. The only difference in the Modesto proposal was that it fixed the timing of merit increases. At the Sacramento Bee, McClatchy could consider employees for increases as frequently or infrequently as it wished, but at the Modesto Bee, increases were tied to the annual review process. As it had in Sacramento, petitioner implemented its final offer after impasse and gave raises to some employees. The union filed a second unfair labor practice charge against McClatchy, and included an allegation that McClatchy had threatened the Modesto employees with discharge for engaging in protected activity. Petitioner had posted a copy of its final offer, with a cover memorandum noting that, in the absence of agreement, the final offer set the terms and conditions of employment. Because the posted offer included a no-strike/no-picketing clause, the union complained that the posting was a veiled threat to employees.

The Board considered the Sacramento case first. The General Counsel argued that because McClatchy had a statutory obligation to bargain over "wages, hours, and terms of employment," granting individual raises without consulting the union violated the National Labor Relations Act. McClatchy maintained that it had satisfied that duty by bargaining to impasse over the discretionary pay proposal. Once it had exhausted the bargaining process by reaching impasse, McClatchy asserted, it was privileged to implement its "last, best, and final offer" over the union's objection. Relying on its decision in *Colorado-Ute Electric Association,* 295 N.L.R.B. No. 67 (1989), *enf. denied,* 939 F.2d 1392 (10th Cir. 1991), the Board rejected McClatchy's defense. In the Board's view, this case was less about impasse than statutory waiver: an employer who proposes unlimited management discretion over wages is really proposing that the union waive its statutory right to be consulted about wage changes. That is fine, the Board reasoned—if the union agrees.

But impasse, by definition a lack of agreement, could not substitute for consent. Without a waiver, nothing relieved McClatchy of its obligation to bargain with the union before changing any employee's pay; unilaterally granting merit increases, therefore, was an unfair labor practice. *McClatchy Newspapers, Inc., Publisher of The Sacramento Bee,* 299 N.L.R.B. No. 156 (1990).

The Board petitioned for enforcement of its order. The majority of the court, in a *per curiam* opinion, held that the Board's decision did not constitute reasoned decisionmaking. *NLRB v. McClatchy Newspapers, Inc.,* 964 F.2d 1153 (D.C. Cir. 1992). The three judges wrote separate opinions, however, each expressing a somewhat different view of the Board's approach. Judge Henderson essentially agreed with the Tenth Circuit's view, expressed in *Colorado-Ute,* that the Board simply could not square its approach with governing precedent under the NLRA. Judge Silberman thought that the issue the Board faced was novel and that the Board's waiver theory might well be a legitimate interpretation of the Act if adequately explained. Chief Judge Edwards believed that the Board's waiver theory would not work, but that it might be possible to articulate a limited exception to the impasse doctrine that would cover this situation. He pointed out that the employer's bypassing the union in setting wage rates could be seen as a kind of de-collectivization of bargaining. *Id.* at 1173. Chief Judge Edwards and Judge Silberman agreed to remand to the Board for further consideration; Judge Henderson would have simply denied enforcement.

On remand, although it still used some language redolent of its original waiver theory,[1] the Board essentially adopted Chief

1. "In sum, it is not the Respondent's bargaining proposal that we view as inimical to the policies of the Act, but its exclusion of

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Judge Edwards' suggestion and fashioned an exception to the implementation after impasse doctrine. The Board explained that although the doctrine "is designed, in part, to allow an employer to exert unilateral economic force. . . . [it is legitimate] only as a method for breaking the impasse." *McClatchy Newspapers, Publisher of The Sacramento Bee,* 321 N.L.R.B. No. 174 at 4 (1996) (*McClatchy II*). In other words, the Board grounded its new "narrow exception" on the impact that implementation would have on the collective bargaining *process:*

> Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of

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(Cont'd)

the Guild at the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan, *when the Guild has not agreed to relinquish its statutory role.*" *McClatchy Newspapers, Publisher of The Sacramento Bee,* 321 N.L.R.B. No. 174 at 6 (1996) (emphasis added).

> wages [sic] rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases. The frequency, extent, and basis for these wage changes would be governed only by the Respondent's exercise of its discretion.

Id. at 6. Echoing Chief Judge Edwards' de-collectivization remark, the decision noted that petitioner's "ongoing ability to exercise its economic force in setting wage increases [without the Guild's participation] . . . would simultaneously disparage the Guild by showing . . . its incapacity to act as the employees' representative in setting terms and conditions of employment." *Id.* The Board took pains to emphasize that its holding was limited to a case where an employer refused to state any "definable objective procedures and criteria" for determining merit. *Id.* It decided the Modesto case by the same reasoning and also found that petitioner had threatened the Modesto employees by posting its final offer, which had included the no-strike clause. *McClatchy Newspapers, Publisher of The Modesto Bee*, 322 N.L.R.B. No. 135 (1996).

Petitioner criticizes the Board for not adhering to portions of the three separate opinions of the judges on the prior panel, or in not answering all of the questions posed by those judges, but it should be understood that only the *per curiam* opinion is the court's holding. The Board's analysis does rely on observations made in the judges' opinions, and the Board adopted Chief Judge Edwards' suggestion. Its decision, however, must be judged on its own bottom—not on whether it conforms in whole or in part to the views of individual judges.

Appendix A

II.

Although the parties agree the case is one in which petitioner unilaterally implemented the terms of its final offers, it does seem somewhat anomalous to refer to the institution of the new wage regime as an "implementation of terms." Essentially, these wage proposals—particularly the one for the Sacramento Bee—have no terms. Indeed, the Board's opinion expresses the tentative view that under *NLRB v. Katz*, 369 U.S. 736 (1962), "a wholly discretionary merit wage policy (*i.e.*, without identifiable procedures and criteria) does not itself 'establish' terms and conditions of employment at any point *prior* to the actual exercise of this discretion in setting discrete wage rates for unit employees." *McClatchy II* at 6 n.24 (emphasis added). In other words, the Board questioned whether the impasse doctrine should even apply to the employer's action. We think there is something to this query, but since it is not the Board's holding, we obviously cannot rely on it in reviewing the Board's decision.

Although petitioner's argument is somewhat diffuse, we detect three lines of attack against the Board's order. The first is that the NLRA—or at least its "settled doctrine"—contemplates that an employer will be able to implement its last offer to the union after impasse; thus, the argument goes, the Board either lacked authority to craft the "narrow exception" applied in this case or was arbitrary and capricious in doing so. Second, petitioner claims that the Board implicitly treats its merit pay proposal as a permissive bargaining subject, despite the Supreme Court's recognition that comparable management discretion clauses are mandatory subjects of bargaining. Finally, the Board is accused of inadequately setting forth the boundaries of the

exception it has crafted and insufficiently reconciling its own precedent.

* * *

The NLRA is wholly silent on the question whether an employer may implement its final offer after impasse. To be sure, the general language of the Act, including § 8(a)(5) and § 8(d), have been authoritatively interpreted by the Supreme Court, and the Board is not free under *Chevron* to alter any of the those interpretations even if they otherwise would be permissible readings of the Act. *See Lechmere, Inc. v. NLRB,* 502 U.S. 527, 536-37 (1992); *Maislin Indus. v. Primary Steel, Inc.,* 497 U.S. 116, 131 (1990). But the Supreme Court, while it has recognized the Board's doctrine, has never held that an employer has the *right* under the statute to implement its final offer, let alone considered whether the Board is entitled to craft exceptions to this supposed right.[2] Indeed, not even the Board has ever held that the NLRA *requires* this rule.

The Board argues, moreover, that its decision does not create the only exception to the rule. It contends, and petitioner does not dispute, that other clauses—dues check-off, union security, no-strike, and arbitration clauses—could not be implemented unilaterally post-impasse. Insofar as dues check-off and union security clauses are exceptions to the post-impasse rule, however, it is not because the Board has authority to treat them as such; rather, the NLRA requires that these clauses be exceptions,

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2. *See Brown v. Pro Football, Inc.,* 116 S. Ct. 2116 (1996); Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced *Lightweight Concrete Co.,* 484 U.S. 539, 544 n.5 (1988); *Charles D. Bonanno Linen Serv. v. NLRB,* 454 U.S. 404 (1982); *NLRB v. Katz,* 369 U.S. 736, 745 n.12 (1962); *NLRB v. Crompton-Highland Mills, Inc.,* 337 U.S. 217, 224 (1949).

because they are legal only if authorized by a collective bargaining agreement. *See* 29 U.S.C. § 158(a)(3) (1994). As for arbitration clauses, it would seem that just as a union cannot force an employer to arbitrate after an agreement has expired, an employer cannot force a union to arbitrate when no agreement has been reached. *See generally Litton Fin. Printing Div. v. NLRB,* 501 U.S. 190 (1991). But that proposition, if true, appears to rest not so much on a Board-crafted exception to the post-impasse rule, but rather on general principles of contract interpretation under § 301 of the Labor Management Relations Act. *See Litton,* 501 U.S. at 203-04; *see also* 29 U.S.C. § 171(b) (1994) (the United States encourages *voluntary* arbitration).

The Board's treatment of no-strike conditions, on the other hand, is somewhat more analogous. The Board has held that because the right to strike is "fundamental," it cannot be relinquished by employees except by consent—which implies a specific contractual waiver. *Gary-Hobart Water Corp.,* 210 N.L.R.B. No. 87 at 744 (1974). It follows, therefore—although the Board has never expressly so held—that an employer could not impose no-strike conditions post-impasse even if embodied in its final contract proposal. It will be recalled that the Board's *McClatchy II* decision still has fragments of its original waiver theory, and the Board's description of wages as of "paramount" concern is certainly akin to its description of the right to strike as "fundamental." And, if the Board's conclusory waiver rationale as applied to no-strike conditions were ever challenged, it would surely say, as it has in these cases, that a unilateral imposition of a no-strike condition would also impair the *process* of collective bargaining—without the right to strike, the union's future bargaining position would be devastated.

Even if the Board has never before determined that an exception to its doctrine was warranted, however, it is not clear

that the statute prevents it from doing so in this case. Petitioner argues that this exception is inconsistent with *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960), which forbids the Board to act "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." *Id.* at 497. But the Supreme Court, in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), has also emphasized that the Board has wide latitude to monitor the bargaining process. There, bargaining between the union and a multi-employer bargaining unit had reached impasse. The union selectively struck Bonanno Linen and attempted to reach secret interim agreements with some of the other employers. This "whipsaw" technique was designed to force a presumably stronger employer like Bonanno Linen to yield to the union's demands, carrying the rest of the unit with it and ending the impasse. In response, however, Bonanno Linen replaced striking workers and notified both the union and the other employers that it was withdrawing from the bargaining unit. The Board held that a bargaining impasse, even when combined with a selective strike and the specter of interim agreements, was not an "unusual circumstance" justifying an employer's unilateral withdrawal from the unit. An employer can only withdraw if it is subject to extreme financial pressures or if the bargaining unit has become substantially fragmented. *Id.* at 411. In the Board's view, giving an individual employer the ability to withdraw at impasse would threaten the stability of multi-employer bargaining units, because dissatisfied employers could walk away instead of working out differences. *Id.* at 412 n. 8.

The Supreme Court deferred to the Board's "rule," notwithstanding strong dissents arguing that the Board had unfairly tied the hands of employers. As one pair of dissenters

protested, "With one or more competitors fully back in business, the ability of the remaining employers to resist the union demands becomes greatly—and unfairly—diminished." *Id.* at 422 (Burger, C.J., dissenting). The majority did not dispute that the Board's decision reduced the struck employer's bargaining power—but the majority, as opposed to the dissenters, did not think this necessarily beyond the Board's reach. In *Insurance Agents'*, the Board had held that the union's use of slow-downs, sit-ins, leafleting, and picketing was a *per se* violation of its obligation to bargain in good faith under § 8(b)(3), the union counterpart to § 8(a)(5).[3] In reversing, the Court emphasized that the Board had taken an erroneous view of collective bargaining, a system in which good-faith bargaining and economic weapons must coexist. *Id.* at 489. But the Court also noted that while economic pressure is not itself inconsistent with § 8(b)(3), the "unique character" of particular tactics might be inconsistent with collective bargaining. *Id.* at 488. In keeping with this point, the Court in *Bonanno Linen* concluded that the Board could "deny an employer a particular economic weapon . . . in the interest of the proper and pre-eminent goal, maintaining the stability of the multi-employer bargaining unit." *Bonanno Linen,* 454 U.S. at 419.

Thus it is true, as petitioner stresses, that *Insurance Agents'* prohibited the Board from "act[ing] at large in equalizing disparities of bargaining power between employer and union."

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3. *Insurance Agents'*, 361 U.S. at 482. Of course, a union's tactics, no matter how troubling or even independently unlawful, are always designed to reach a collective bargaining agreement. An employer, on the other hand, may well wish to break the union. Neither the Board nor the Supreme Court has mentioned this asymmetrical factor, but it may have affected decisions.

Insurance Agents', 361 U.S. at 428. But it is also true, as *Bonanno Linen* makes apparent, that regulating the process of collective bargaining may involve the Board in making determinations that necessarily implicate—if they do not rest directly on—the Board's appraisal of conditions that will affect the parties' bargaining power. Although the line between economic neutrality and authority over process is exceedingly difficult to draw, we think that this case is marginally closer to *Bonanno Linen* than to *Insurance Agents'*. Here, as in *Bonanno Linen*, the Board has denied the employer a particular economic tactic for the sake of preserving the stability of the collective bargaining process.

The post-impasse rule itself regulates process through power. The Board has told us that its rationale for permitting an employer to unilaterally implement its final offer after impasse is that such an action breaks the impasse and therefore encourages future collective bargaining.[4] The theory might well be thought somewhat strained, for it does not explain why the Board decided to handle impasse with this rule instead of another. The Board could have adopted, for example, a rule requiring the status quo to remain in effect until either the union or the employer was willing to resume negotiations. Stagnancy

4. We can find, however, no "seminal case" setting forth the Board's rationale underlying the impasse rule. *Cf.* Ellen J. Dannin, *Collective Bargaining Impasse and Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment?* 19 U. TOL. L. REV. 41, 44 n.7 (1987). *Taft Broadcasting Co.*, 163 N.L.R.B. No. 55 (1967), *enf. sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), is usually cited as the prime case, but *Taft* assumes the existence of the rule and goes on to list criteria for determining whether impasse has been reached in good-faith. The cases that best describe the Board's rationale are *Hiway Billboards, Inc.*, 206 N.L.R.B. No. 1 (1973) and *Bi-Rite Foods, Inc.*, 147 N.L.R.B. No. 11 (1964).

might pressure both the employer and the union to bend. But the rule it did choose—allowing the employer to implement its final offer—moves the process forward by giving one party, the employer, economic leverage. And in this case, where the employer has advanced no substantive criteria for its merit pay proposal, the Board has decided that the economic power it has granted would go too far. Rather than merely pressuring the union, implementation might well irreparably undermine its ability to bargain. Since the union could not know what criteria, if any, petitioner was using to award individual salary increases, it could not bargain against those standards; instead, it faced a discretionary cloud. As the Board put it, "the present case represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *McClatchy II* at 6. We think that it is within the Board's authority to prevent this development:

> [T]he Board, employing its expertise in the light of experience, has sought to balance the 'conflicting legitimate interests' in pursuit of the 'national policy of promoting labor peace through strengthened collective bargaining.' The Board might have struck a different *balance* from the one it has, and it may be that some or all of us would prefer that it had done so. *But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that Buffalo Linen ruled should be left to the Board.*

Bonanno Linen, 454 U.S. at 413 (emphasis added) (citations omitted). Of course, if relative bargaining strength were not a matter that the Board could consider in determining whether

petitioner's action furthered the collective bargaining process, the Board's reasoning would be vulnerable. But that is not how we read *Bonanno Linen.*

Not only does an employer's implementation of a proposal such as petitioner's deprive the union of "purchase" in pursuing future negotiations, the Board also concluded that by excluding the union from the process by which individual rates of pay are set petitioner "simultaneously disparag[ed] the Guild by showing . . . its incapacity to act as the employees' representative in setting terms and conditions of employment." *McClatchy II* at 6. It knew no specifics about the merit raises, therefore it had no information to relay. In that regard, the Board echoed concerns expressed in Chief Judge Edwards' prior concurring opinion that petitioner's implementation of its proposal could be seen as seeking de-collectivization of bargaining.[5] The Board concluded that petitioner's action was "so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break

5. De-collectivization concerns are related to concerns about direct dealing, although direct dealing is not itself at issue in this case. In *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), the court, reversing the Board, held that a proposal for direct employer-employee negotiations over retirement buyouts was a permissive subject upon which an employer could not insist to impasse. The Board has not, however, applied *Toledo Blade* to proposals that preserve some role for the union as bargaining agent. In *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284 (D.C. Cir. 1991), the court upheld the Board's determination that an employer committed no unfair labor practice by insisting to impasse on a unilateral merit pay plan because the plan allowed the union to participate in the grievance procedure. The Board seems to have followed *Cincinnati Newspaper Guild* in this case, and it has not been suggested that McClatchy's merit pay plan was a permissive subject.

impasse and restore active collective bargaining." *McClatchy II* at 6 (citations omitted). Petitioner particularly objects to this passage, arguing that the phrase "inherently destructive"—which, as the Board acknowledges, comes from *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)—applies only to employer behavior that is claimed to violate § 8(a)(3), the anti-discrimination provision of the Act. But the Board explained that it was using the term only to show that, as in *Great Dane*, the employer's action will have "foreseeable consequences" notwithstanding its motive. We do not see why that observation is independently objectionable.

* * *

Nevertheless, petitioner contends that the Board's logic is inconsistent with *NLRB v. American National Insurance*, 343 U.S. 395 (1952), which held that a clause giving an employer discretion over "management functions" such as promotions, discipline and work scheduling is a mandatory subject of bargaining—*i.e.*, one on which an employer is entitled to insist to the point of impasse. The Court there said that the Board is not entitled to "sit in judgment upon the substantive terms of collective bargaining agreements," *id.* at 404, and petitioner asserts that the Board is doing just that in this case. The Board, petitioner argues, has really based its entire reasoning on its judgment about the substance of petitioner's pay proposal.

It seems to us that petitioner may well overread *American National Insurance*. The Court there dealt with a management functions clause that was traditional in the insurance industry. Can one imagine employee's pay—in *any* industry—being described as a subject of a *management functions* clause? And the Court held only that "[a]ny fears the Board may entertain

that use of management functions clauses will lead to *evasion* of an employer's duty to bargain collectively as to 'rates of pay, wages, hours, and conditions of employment' do not justify condemning all bargaining for management functions clauses concerning *any* 'condition of employment'. . . ." *Id.* at 409 (emphasis added). We rather doubt that *American National Insurance* means that no employer proposal could be condemned as a *per se* indication of bad faith bargaining. Suppose, for instance, an employer proposed that all working conditions, including wages and hours, were to be determined in accordance with the employer's total discretion. The offered agreement would have just three clauses: (1) union recognition, (2) the employer's discretion over all terms, and (3) a no-strike clause. That would seem to be the paradigm management functions clause "evading" the employer's collective bargaining duty.

In any event, the Board did not hold, as it did in *American National Insurance*, that petitioner's insistence on its pay proposal was a permissive subject of bargaining; petitioner was therefore entitled to insist on it to impasse. Petitioner claims, however, that by declaring its "implementation" after impasse illegal the Board has done indirectly what it could not do directly. If an employer cannot implement its proposal then the union has a permanent "veto," *see Colorado-Ute Elec. Ass'n v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991), which, it is argued, is simply another way for the Board to treat an employer's insistence on the proposal as illegal. Petitioner's argument has a good deal of force, but it does not quite carry the day. As the Board's counsel pointed out, the two steps of bargaining to impasse and implementing after impasse are not practically equivalent and therefore can be judged according to different standards. If a party can force an impasse over a subject, its authority to do so gives it significant leverage over all other

matters. That ability is not lost—at least not totally—by the Board's holding that the same proposal may not be unilaterally implemented after impasse.

Admittedly, an employer in this situation is somewhat "stuck" on its wage proposal. Normal labor market pressures presumably will require it to increase salaries. (But as we noted earlier, the stalemate could pressure the union as well. *See infra* p. 12.) It can, of course, bargain *ad hoc* with the union as to each increase, but transaction costs might (or might not) make that infeasible. We cannot visualize exactly how various scenarios would play out—and it is not our job to do so; it is the Board's authority over the "dynamics of collective bargaining" to which we must defer. It is important to recognize, however, that the Board's decision does not prevent an employer from implementing a merit pay proposal post-impasse—so long as the proposal defines "merit" with objective criteria.

The Board's conclusion that petitioner may not unilaterally implement its proposal certainly draws from the substance of that proposal. But that is not unprecedented. To some degree, the Board often considers substance when regulating process. The Board must look to the content of a proposal to decide whether a subject is mandatory or permissive under § 8(d). *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).[6] As petitioner itself concedes, the Board may consider the content of a proposal when making a determination whether the employer is engaged in "surface bargaining." *See, e.g., NLRB*

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6. Indeed, Justice Harlan dissented in *Borg-Warner* primarily because he thought that categorizing bargaining subjects involved the Board too much in the substance of the proposal. The majority of the Court, however, did not think this inconsistent with either *American National Insurance* or the Act itself.

v. Pacific Grinding Wheel Co., 572 F.2d 1343, 1348 (9th Cir. 1978). Here, as in those instances, the Board's reliance on substance is not the same as "compelling McClatchy to agree to a proposal." *See* 29 U.S.C. § 158(d).

The Tenth Circuit, in *Colorado-Ute*, strongly suggests a contrary view. Relying on *American National Insurance*, it said that the employer had a "right" to use the "economic weapon of implementing at impasse" and that "this right exists irrespective of the parties' bargaining positions." *Colorado-Ute*, 939 F.2d at 1404. But the case before the Tenth Circuit rested on the Board's initial waiver theory that we too rejected. The Board did not rely in *Colorado-Ute* on its authority under *Bonanno Linen* to "assess[ ] the significance of impasse and the dynamics of collective bargaining." *See Bonanno Linen*, 454 U.S. at 413. The Tenth Circuit thus did not actually decide the precise issue before us; its opinion does not even mention *Bonanno Linen*. Moreover, *Colorado-Ute* may be distinguishable even under the Board's new rationale. The Tenth Circuit was under the impression that the merit increases limited the employer's discretion to the extent that they were linked to the identifiable criteria of "job performance" and "contribution on the job." [7]

* * *

Finally, petitioner argues that the Board has not explained adequately why it is making an exception for a proposal that

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7. Our reading of the Board's decision in *Colorado-Ute*, however, suggests that "merit" pay was as substantively standardless there as here. *Colorado-Ute Elec. Ass'n*, 295 N.L.R.B. No. 67 (1989). Colorado-Ute's proposal did limit the employer's discretion as to amount, because increases were granted within a fixed range of progression steps. *Id.*

affords an employer complete discretion over the grounds for and timing of wage increases. Petitioner asks, why are wages to be thought different than hours or other working conditions the statute also treats as mandatory subjects of bargaining? The Board explained that wages are "a key term and condition of employment and a primary basis of negotiations," *McClatchy II* at 6. That proposition, drawn perforce from the Board's expertise, seems hard to challenge in a reviewing court. The Board also thought its conclusion that wages were of "paramount importance" was supported by the wording of § 8(d), which lists wages first before hours and working conditions as subjects for collective bargaining. It does seem that the order—particularly when one considers that wages are, after all, a working condition and are nonetheless separately mentioned—is a legitimate point, if only a make-weight.

Admittedly, the Board's explanation as to why wages would be treated differently than, let us say, the decisions covered by the management functions clause in *American National Insurance,* is hardly a full one; it is surely not as extensive as the judges on the prior panel had wished. Nevertheless, we recognize the issue is analytically difficult and appreciate the Board's desire to proceed cautiously. Perhaps any hard and fast boundary drawing will force the Board prematurely to decide legal policy issues; agencies are entitled, just as courts, to proceed case by case. *Stereo Broadcasters, Inc. v. FCC,* 652 F.2d 1026, 1031 (D.C. Cir. 1981). We think the Board is free to draw on its expertise to determine that wages are typically of paramount importance in collective bargaining and to suggest that wages, unlike scheduling or a host of other decisions generally thought closely tied to management

operations, are expected to be set bilaterally in a collective bargaining relationship.[8]

Petitioner also claims that the Board inadequately explained its deviation from its reasoning in prior cases. But the Board simply overruled portions of those decisions inconsistent with its reasoning in this case. Agencies are entitled to do just that.

III.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain or coerce" employees in the exercise of the rights guaranteed by § 7 of the Act. 29 U.S.C. § 158(a)(1) (1994). The Board found that McClatchy threatened its Modesto Bee employees with discharge in violation of § 8(a)(1) by posting its final offer, which included a no-strike/no-picketing clause. Petitioner claims, however, that both the Amended Complaint and the hearing before the ALJ focused only on whether McClatchy had an "affirmative duty to explain" the nonbinding nature of the no-strike clause rather than on whether the posting "threatened" the employees. Therefore, petitioner argues, the charge violates its due process rights because "[t]he Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981). We think that McClatchy is splitting hairs. The Amended Complaint described

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8. We think the Board also has the authority to decide that having fixed standards as well as fixed timing for considering raises is necessary if an employer wishes to implement its proposal. Thus we find no fault with the Board's decision to treat the Modesto and Sacramento proposals identically, even though Modesto had fixed timing.

the posting of the no-strike provision and alleged that McClatchy failed "[to give] notice to employees that a no-strike proposal as described therein is not enforceable in the absence of a binding contract between the parties, and that, without such a binding contract, employees were free to strike." It is hard to say that petitioner was not on notice that the General Counsel thought the posting misled the employees into thinking that McClatchy would fire them for striking. Why would there be a question of McClatchy's clarifying the notice if it caused no confusion? Even assuming that this pleading is not specific enough, however, due process is satisfied if the issue is "fairly tried by the parties." Petitioner relies on *Blake Construction,* but there, although the General Counsel never alleged that the Company's treatment of non-union employees amounted to a violation of § 8(a)(1) or (5), the Board found an unfair labor practice on that ground. Here, the General Counsel alleged from the beginning that the posting violated § 8(a)(1); both the "affirmative duty to inform" and the "threatening" theories focused on same portion of the statute and the same set of facts. Granted, the General Counsel slightly shifted his legal theory after the hearing, but McClatchy has not argued that it would have litigated the issue differently at the hearing had it faced the "threatening" theory. To the contrary, petitioner has used the same arguments to counter both theories: that the union notified the employees of their rights and that McClatchy took no retaliatory action when employees picketed. The issue was thus "fairly tried."

We nevertheless agree with petitioner that the § 8(a)(1) violation is not supported by substantial evidence. In evaluating an employer's conduct under § 8(a)(1), the Board must consider "whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate." *NLRB v. Nueva*

Eng'g, Inc., 761 F.2d 961, 965 (4th Cir. 1985) (quoting *Corrie Corp. v. NLRB*, 375 F.2d 149,153 (4th Cir. 1967)). In this case, the circumstances raise such a weak inference of intimidation that it is an intolerable stretch to say that substantial evidence supports it. The no-strike clause, which was buried in the document as "subsection 23.1," stated:

> *During the term of this Agreement* the Guild and its agents will not cause, permit, condone, encourage, or sanction and no employee or employees of the Publisher will participate or engage in any strike. . . . Any employee or employees covered by this Agreement engaging in any such activity shall be subject to immediate discharge as said misconduct shall constitute just cause for discharge under this Contract.

(emphasis added). In characterizing the posting as a threat, the ALJ relied on what he described as the "negative pregnant" of the offer's cover page, which noted that "the Publisher reserves the right not to apply any provision of these terms and conditions that depends upon the existence of a binding contract between the parties for enforceability."

This wording, the ALJ thought, implied that McClatchy had the authority to enforce the no-strike clause if it so wished. Other language in the posting, however, cuts against this strained inference. The no-strike clause itself began by saying it was enforceable "[d]uring the term of this Agreement," and the memorandum accompanying the posted offer emphasized several times that the Company and the union had "been unable to reach agreement" and that there was "no contract." The union represents educated employees who work in the editorial

department. No evidence in the record suggests that these employees did not understand that the no-strike clause only applied during an agreement. Indeed, the employees picketed, suggesting that they felt no threat. We decline to enforce this portion of the Board's order.

* * *

This case presents a difficult question because of the tension between the Supreme Court decisions bearing on the Board's limited exception to the post-impasse rule. We certainly understand how Board members can come to different conclusions—witness member Cohen's dissent. *McClatchy II* at 7. The question is even more difficult for us as a reviewing court, and we are obliged to admit that we are unsure ourselves as to the right answer. Under those circumstances, we think the appropriate course, keeping in mind the Board's "primary responsibility for developing and applying national labor policy," *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996) (quoting *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)), is to defer to the Board's interpretation of the Act.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DECIDED DECEMBER 31, 1996

McClatchy Newspapers, Publisher Of The Modesto Bee *and* Northern California Newspaper Guild, Local No. 52, The Newspaper Guild, AFL CIO, CLC. Case 32-CA-11228

December 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On June 26, 1991, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and statements of position, and has decided to affirm the judge's rulings, findings, and

1. By notice dated July 17, 1992, the Board invited the parties to file statements of position concerning the impact on this case, if any, of the court's decision in *NLRB v. McClatchy Newspapers,* 964 F.2d 1153 (D C. Cir. 1992). Subsequently, the Board also granted permission to the Council of Labor Law Equality (COLLE) to file an amicus brief. All parties and COLLE filed statements of position, the Charging Party and the Respondent filed reply briefs, and the Respondent and COLLE requested oral argument. The requests for oral argument are denied as the record, exceptions, briefs, and statements of position adequately present the issues and positions of the parties.

conclusions consistent with our discussion below, and to adopt the recommended Order as modified and set out in full below.

As in *McClatchy Newspapers*, 321 NLRB 1386 (1996) ("*McClatchy II*"), the primary issue in this case is whether the Respondent violated Section 8(a)(5) and (1) and Section 8(d) by unilaterally changing wages of unit employees after having bargained to impasse on its proposal to institute a discretionary merit pay plan.

The parties stipulated to the relevant facts, which are fully detailed in the judge's decision. In short, after the contractual parties bargained unsuccessfully for 3 years for a successor collective-bargaining agreement, the Respondent unilaterally implemented its final negotiating offer on May 21, 1990. There is no dispute that the parties' bargaining had been in good faith and that a lawful impasse had been reached before implementation. The final offer provided, inter alia, for salary increases based on merit; they were to be determined at the Respondent's sole discretion, based on its annual evaluation of job performance. Pursuant to these terms, the Respondent granted merit increases to 77 unit employees between May 21, 1990, and the time of the unfair labor practice hearing. Consistent with the implemented provisions, the Union's role in the merit increase procedure was limited to those situations in which a unit employee chose to appeal a merit increase determination and further chose to request representation by the Union in the appeal process.

The judge concluded that, notwithstanding the fact that the Respondent bargained its discretionary merit increase proposal to a lawful impasse, its unilateral granting of merit wage increases to unit employees, without bargaining with the

Union concerning the timing and amounts of the increases, violated Section 8(a)(5) and (1). The Respondent filed exceptions to the judge's decision with the Board. While this case was pending before the Board, the U.S. Court of Appeals for the Tenth Circuit denied enforcement of the Board's decision in *Colorado Ute, 295* NLRB 607 (1989),[2] and the D.C. Circuit remanded *McClatchy Newspapers,* 299 NLRB 1045 (1990) (*"McClatchy I"*), to the Board for further consideration.[3] The judge in the instant case had relied in significant part on both of these Board decisions in reaching his conclusion above.

In *McClatchy II,* the Board responded to the D.C. Circuit's instructions on remand by providing a new analysis in support of the fmding that the respondent violated Section 8(a)(5) and (1) by unilaterally implementing its merit increase wage proposal following a lawful bargaining impasse. The Board reasoned as follows:

> In brief, we find that preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay.
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> . . . .
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> Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the employer could thereafter unilaterally exert

2. 939 F.2d 1392 (10th Cir. 1991).

3. 964 F.2d 1153 (D.C. Cir. 1992).

> unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria, the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process." . . . [W]e find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's agreement), it would be so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.

321 NLRB 1386, 1388, 1390-1391 (fn. citations omitted).

The instant case is controlled by the Board's decision in *McClatchy II*. The Respondent's obligation was to negotiate to agreement or to impasse "definable objective procedures and criteria" governing raises under its merit pay proposal prior to implementation of the proposal. Id. at 1391. As in *McClatchy II*, "no such substantive negotiations ever occurred." Ibid.[4]

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4. We acknowledge that the Respondent here did propose and bargain to impasse a defined element of its discretionary merit increase proposal—the timing of a wage increase. Thus, the Respondent proposed that a merit increase, if granted, "shall be effective for the Bust full pay period following completion of the [annual] performance review process." See sec. 5.3 of the Respondent's unilaterally implemented merit pay proposal, set forth at part III,B of the judge's decision. However, we also note the integrated nature of the procedures and criteria relevant to a merit pay proposal such as the Respondent's, and the limited, independent significance of the timing component in the context of the proposal.

(Cont'd)

Consequently, the unilateral implementation of the Respondent's discretionary merit pay plan was inherently destructive of the statutory collective-bargaining process, and an exception to the postimpasse implementation rules is therefore warranted. Accordingly, and as more fully explained in *McClatchy II*, we affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) in view of its failure and refusal to satisfy its obligation to bargain with the Union prior to granting merit wage increases to unit employees. We will modify the judge's recommended Order to set forth an appropriate remedy consistent with the substance of *McClatchy II*.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, McClatchy Newspapers, Publisher of the Modesto Bee, Modesto, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting merit wage increases to employees in the following appropriate bargaining unit without having offered

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(Cont'd)

Thus, the Respondent's negotiation of this substantive element to impasse does not diminish the unfair labor practice committed here. See *Plainville Ready MLZ Concrete Co.*, 309 NLRB 581, 588 (1992), enfd. 44 F.3d 1320 (6th Cir. 1995) (postimpasse implementation of portions of an integrated overall health insurance proposal violated Sec. 8(a)(5)).

5. We shall also modify the judge's Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

to bargain with Northern California Newspaper Guild, Local No. 52, The Newspaper Guild, AFL-CIO, CLC about the procedures and criteria relevant to those increases. The appropriate bargaining unit is:

> All editorial department employees, excluding the executive editor, managing editor, editor of the editorial page, two associate editors, metro editor, two assistant metro editors, executive sports editor, sports editor, news editor, one assistant news editor, features editor, assistant features editor, business editor, weekend editor, graphics editor, chief artist, chief photographer, chief librarian, chief copy clerk and confidential secretary to the executive director

(b) Expressly or impliedly threatening to discharge or otherwise discipline employees for engaging in activity, such as striking and picketing, protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the representative of the employees in the unit described above about the procedures and criteria relevant to merit wage increases prior to granting merit wage increases to unit employees.

(b) At the Union's request, cancel any merit wage increases granted to unit employees pursuant to its unlawful unilateral conduct in this case.

Appendix B

(c) Within 14 days after service by the Region, post at its Modesto, California place of business copies of the attached notice[6] marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 1990.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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6. See fn. 3 of the judge's decision.

7. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT grant merit wage increases to you prior to offering to bargain with Northern California Newspaper Guild, Local No. 52, The Newspaper Guild, AFL-CIO, CLC, as the representative of editorial department employees, about the procedures and criteria relevant to such increases.

WE WILL NOT expressly or impliedly threaten to discharge or otherwise discipline you for engaging in activity, such as striking and picketing, protected by Section 7 of the National Labor Relations Act.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the labor organization named above as the representative of editorial department employees about the procedures and criteria relevant to employee merit wage increases prior to granting such wage increases.

WE WILL, if the labor organization named above requests, cancel merit wage increases granted to employees pursuant to our unlawful unilateral conduct.

McCLATCHY NEWSPAPERS, PUBLISHER
OF THE MODESTO BEE

Jeffrey L. Henze, for the General Counsel.

Allen W. Teagle and *William F. Terheyden (Littler, Mendelson, Fastiff & Ticky),* with him on brief, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Atwater, California, on January 23, 1991. On January 9, 1991, the Regional Director for Region 32 of the National Labor Relations Board (the Board), issued an amended complaint and notice of hearing, based upon an unfair labor practices charge filed on June 27, 1990, alleging violations of Section (a)(1) and (5) of the National Labor Relations Act (the

Act). All parties have been afforded full opportunity to appear, to introduce evidence, to call and examine witnesses, and to file briefs. Based on the entire record and on the briefs that were filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, McClatchy Newspapers, publisher of the Modesto Bee (Respondent), has been a corporation with an office and place of business in Modesto, California, and has engaged in the publication of a daily newspaper. During the 12-month period preceding issuance of the complaint, in the course and conduct of its business operations, Respondent derived gross revenues in excess of $200,000, held membership in or subscribed to various interstate news services, including the Associated Press, published various nationally syndicated features, advertised various nationally sold products, and purchased and received goods or services valued in excess of $5,000 which originated outside the State of California. Therefore, I conclude, as admitted in the answer to complaint, that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Northern California Newspaper Guild, No. 52, The Newspaper Guild, AFL CIO, CLC (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

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III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Since at least 1975 the Union has been, and has been recognized by Respondent as being, the exclusive collective-bargaining representative of employees in an admittedly appropriate unit of all editorial department employees, excluding the executive editor, managing editor, editor of the editorial page, two associate editors, metro director, two assistant metro editors, executive sports editor, sports editor, news editor, one assistant news editor, features editor, assistant features editor, business editor, weekend editor, graphics editor, chief artist, chief photographer, chief librarian, chief copy clerk and confidential secretary to the executive director.[1] The most recent contract between the parties expired on April 30, 1987. Negotiations for agreement on the terms for a successive contract reached impasse by May 2, 1990. There is no contention that either those negotiations or the resultant impasse were other than in good faith.

On May 21, 1990, Respondent posted at its Modesto facility the provisions of its final offer in a multipage document entitled "Terms and Conditions of Employment." In a covering memorandum, the employees were notified, inter alia, by Respondent:

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1. The inclusion/exclusion of two additional positions—assistant sports editor and a second assistant news editor—remains in dispute. However, the parties stipulated that for purposes of this proceeding that dispute is not material or dispositive and that this Decision would not resolve their inclusion in or exclusion from the unit.

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> Since we have been unable to reach agreement with the [Union] on terms of a new contract and are at impasse in negotiations, the terms and conditions of the prior contract have been cancelled and the Publisher is posting terms and conditions of employment based on its final offer.

Typed at the bottom of the covering page for the Terms and Conditions of Employment is the legend:

> SINCE THERE IS NOT A CURRENT AGREEMENT BETWEEN THE PUBLISHER AND THE NEWSPAPER GUILD ON TERMS OF A NEW COLLECTIVE BARGAINING AGREEMENT, THE PUBLISHER RESERVES THE RIGHT NOT TO APPLY ANY PROVISION OF THESE TERMS AND CONDITIONS THAT DEPENDS UPON THE EXISTENCE OF A BINDING CONTRACT BETWEEN THE PARTIES FOR ENFORCEABILITY.

There is no contention that Respondent violated the Act by having posted these terms from its final offer. However, it is alleged that implementation of the merit pay provisions violated Section 8(a)(5) and (1) of the Act and, further, that inclusion of a no-strike provision without specific explanation that it is not enforceable without a binding contract violated Section 8(a)(1) of the Act. For the reasons set forth post, I conclude that Respondent did commit violations of Section 8(a)(1) and (5) of the Act.

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B. *Implementation of the Merit Pay Proposal*

To the extent pertinent here, subsection 3.8 of the most recent contract provided that:

> Nothing in this Contract shall prevent employees from bargaining individually for salary increases in excess of the minimums established herein. Employees covered under this Contract may be awarded a merit salary increase in excess of the minimums provided herein. At the time of an employee's annual performance review, such merit increases may be given, increased, reduced, or eliminated.

This provision would be replaced by the proposals in Respondent's final offer of May 2, 1990. The merit pay provisions of that offer, as set forth in the subsequently posted Terms and Conditions of Employment, provided:

> 5.1 Employees covered by this Contract shall receive an annual Job Performance Review.
>
> (a) [Respondent] shall conduct initial Job Performance Reviews of all employees covered by this Contract who have completed at least one (1) year's service with the Modesto Bee within six (6) months of signing this Contract.
>
> (b) The initial Job Performance Reviews shall be conducted by department on the basis of seniority.

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5.2 Based upon the annual Job Performance Review, an employee may receive a salary increase. It is understood that some employees may not receive salary increases and that the amount of salary increases, if any, will vary depending on individual employee performance.

5.3 Salary increases, if any, shall be granted and their amounts determined at the sole discretion of [Respondent] based on job performance and shall be effective for the first full pay period following completion of the performance review process. The provisions of this Section 5 shall not be subject to the provisions of Section 9 (Settlement of Disputes) of this Contract.

5.4 Any employee who receives a Job Performance Review may, within one week, appeal the salary increase determination.

(a) The employee shall first take his or her appeal of the salary increase determination to the Managing Editor.

(b) Should the Managing Editor fail to resolve the issue to the satisfaction of the employee, within one week thereafter the employee may appeal the salary increase determination to the Executive Editor. The decision of the Executive Editor shall be final.

(c) Upon the request of the employee, the [Union] may participate with the employee in the appeal process.

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After posting the Final Terms and Conditions of Employment, Respondent implemented section 5 consistent with its written terms. As a result, by the time of the hearing 77 employees' performance had been reviewed and merit increases had been awarded to all of them. However, 23 of them were not satisfied with the merit increases received and, under section 5.4(a), they appealed to the managing editor who agreed with 8 of them, retroactively increasing the amounts of the initially granted merit increases. Seven of the other employees appealed to the executive editor, who agreed in one instance to retroactively increase the amount of that employee's initially granted merit increase.

As quoted above, subsection 5.4(c) provided for participation by the Union in the appeals process regarding merit increases. In fact, a representative of the Union participated in nine of the 23 appeals to the managing editor and in four of the seven appeals to the executive editor. Respondent placed no restrictions on the Union's participation, nor on what its representative could say or do, during the appeals meetings with the managing and executive editors. Nevertheless, the Union's role in the merit pay review has been, and will continue to be, limited to situations where an employee chooses to appeal a merit pay determination and, further, chooses to request representation by the Union in making that appeal.

In *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), the Board held that even though the respondent had lawfully bargained to impasse on a merit wage increase proposal, it violated Section 8(a)(5) and (1) of the Act by implementing its proposal, because unilateral merit wage increases were granted to employees without first offering to bargain with their bargaining agent concerning the timing and amounts of each

increase. "Thus, to the extent that implementation of a merit pay program also involves discretion in determining the amounts or timing of increases, it is a matter for consultation with the bargaining agent." (Citation omitted.) *McClatchy Newspapers,* 299 NLRB 1039, 1040 (1990). Obviously, Respondent does not agree with the result reached in *Colorado-Ute.* However, it does not contend that the doctrine enunciated in that case applies with less force to its Modesto publication than it applied in connection with the Sacramento Bee. Consequently, regardless of possible reservations concerning the analytical underpinnings or implications of the *Colorado-Ute* doctrine, an administrative law judge is obliged to follow and apply it in appropriate circumstances. Therefore, I conclude that by granting merit increases without prior consultation with the Union concerning their timing and amounts, Respondent violated Section 8(a)(5) and (1) of the Act.

C. *The No-Strike Provision*

Subsection 23.1 of Respondent's final offer and of its Terms and Conditions of Employment provides:

> During the term of this Agreement the [Union] and its agents will not cause, permit, condone, encourage or sanction and no employee or employees of [Respondent] will participate or engage in any strike, slowdown, sick-in, cessation of work, withholding services, work stoppages, picketing, interference with operations of [Respondent] or sale or distribution of its products directed against [Respondent] at any location. Any employee or employees covered by this Agreement engaging in any such activity shall be subject to immediate

> discharge as said misconduct shall constitute just cause for discharge under this Contract. In the event of a strike by another bargaining unit against [Respondent], the [Union] shall not encourage the honoring of the other union's picket line, and shall advise its members in writing that honoring such picket lines may lead to permanent replacement.

It is undisputed that this provision did not constitute a waiver of employees' statutory right to strike under the facts in this case, because such a provision would become effective only upon full agreement to the terms for a contract or upon waiver by the Union of its right to bargain about its application. Neither alternative has occurred regarding subsection 23.1: no bargaining has occurred since May 21, 1990, and the Union never waived Respondent's employees' right to strike.

The General Counsel alleges that by including subsection 23.1 in the Terms and Conditions of Employment Respondent interfered with the employees' statutory right to strike in violation of Section 8(a)(1) of the Act. In opposing that allegation, Respondent points to several stipulated and undisputed facts: on its face, subsection 23.1 is confined to "During the term of the Agreement," and, as set forth in subsection III,A, supra, the covering memorandum to the Terms and Conditions of Employment explained expressly that "we have been unable to reach agreement with the [Union] on terms of a new contract."; the Union has informed the bargaining unit employees, including by posting notices on Respondent's editorial department bulletin board, that they could engage in strikes and picketing against Respondent; picketing by members of the bargaining unit has actually occurred on five or six separate occasions, not in conjunction with a strike or withholding of

services by the Union, on and after May 21, 1990; and, at no time has Respondent disciplined or taken any adverse action against any employee who engaged in that picketing.

In support of this allegation, the General Counsel argues primarily that Respondent had an affirmative duty of explaining to its employees that subsection 23.1 could not be enforced absent existence of a binding contract with the Union. Yet, under the Act, an employer is allowed "to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations," *Proctor & Gamble Mfg.*, 160 NLRB 334, 340 (1966), and, by extension, to inform employees of the terms of a last and final offer that are being implemented and put into effect. The General Counsel has cited no authority for the proposition that, in addition, an employer has an affirmative duty to explain to employees the meaning of the terms in a last and final offer, even when those terms are being implemented. Indeed, imposition of such a duty should occur only after analysis of certain policy implications that it might affect. For example, such a duty could run the risk of inviting communication that could lead to direct bargaining with employees and to employer usurpation of bargaining aspects ordinarily allocated to employees' bargaining agents. Similar considerations led an administrative law judge to dismiss an identical affirmative-explanation-duty argument in *McClatchy Newspapers, Inc., Publisher of the Sacramento Bee,* JD(SF)-4-91, slip op. at 14-15 (Jan. 23, 1991).

In the final analysis, however, it is not necessary to resolve that affirmative duty argument in the context of this case, given the facts as presented and the, in effect, alternative arguments advanced by the General Counsel. For, as quoted in subsection

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III,A, supra, Respondent prefaced its enumeration of implemented terms with a covering page bearing a legend notifying employees that, absent a current contract, Respondent reserved the right not to apply those provisions dependent upon the existence of such a contract. That choice of terminology has two effects. First, such a negative pregnant implies that Respondent possesses authority to implement all of the terms recited in the Terms and Conditions of Employment, even those pertaining to statutory rights whose lawful implementation is contingent upon waiver by the employees' bargaining agent. Yet, that implication is an incorrect one.

Second, the wording of the legend effectively notifies employees of a possibility that Respondent may discharge any of them who engages in the statutorily protected rights enumerated in subsection 23.1. Certainly, it cannot be forcefully argued that, absent a valid waiver, employers are free to directly tell employees that they will be discharged for engaging in such activity as striking and picketing. No less, "to tell employees that such is a *possibility* is not an accurate statement of the law; and such necessarily threatens employees with discharge in the event they exercise their protected right to strike." (Emphasis added.) *R. L. White Co.*, 262 NLRB 575, 584 (1982). That is, by telling employees that it reserves the right not to apply provisions such as subsection 23.1, Respondent unlawfully informed them of a possibility of discharge for engaging in statutorily protected activity.

That conclusion is neither nullified nor mitigated by any other aspect in this case. The presence of unprotected acts—such as a slowdown—among those actions proscribed in subsection 23.1 does not alter the fact that statutorily protected acts are lumped together and given equal status among the

actions proscribed by it. If Respondent had sought to confine its exercise of disciplinary discretion to unprotected activity, it should have prepared and posted more specific and particularized language in its Terms and Conditions of Employment.

Nor can it be said that Respondent's threat of possible discharge is tacitly repudiated by the fact that Respondent took no action against employees who picketed on five or six occasions after May 21, 1990. At best, its failure to discharge them shows only that it chose to exercise its asserted discretion not to do so on those particular occasions. It does not negate the implied claim that Respondent possessed authority to do so and, further, might choose to exercise that discretion in the future by discharging employees who engaged in such activity on a seventh or eighth or some subsequent occasion.

Finally, the Union neither controls, nor is an agent of, Respondent. Accordingly, its statements to employees concerning the lawfulness or unlawfulness of particular threatened action by Respondent constitutes neither a repudiation of Respondent's stated message, in the Terms and Conditions of Employment, nor a lesser form of assurance that Respondent will not illegally discharge employees for engaging in statutorily protected activity. Therefore, I conclude that by announcing to employees that it reserved the right not to discharge employees for engaging in statutorily protected activity enumerated in subsection 23.1 of its Terms and Conditions of Employment, Respondent threatened them in violation of Section 8(a)(1) of the Act.

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CONCLUSIONS OF LAW

McClatchy Newspapers, Publisher of the Modesto Bee has committed unfair labor practices affecting commerce by unilaterally granting merit wage increases to employees without offering to bargain with Northern California Newspaper Guild, No. 52, The Newspaper Guild, AFL-CIO, CLC about the timing and amounts of the increases, in violation of Section 8(a)(5) and (1) of the Act, and by threatening employees with discharge for engaging in activity protected by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that McClatchy Newspapers, Publisher of the Modesto Bee engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to bargain with Northern California Newspaper Guild, No. 52, The Newspaper Guild, AFL-CIO, CLC about the timing and amounts of employee merit increases and, further, upon that labor organization's request, to cancel wage increases unilaterally granted to employees. Nothing in the Order, however, should be construed as requiring cancellation of any wage increase without a request from the above-named labor organization. See *McClatchy Newspapers*, supra at 1041.

[Recommended Order omitted from publication.]

APPENDIX C — SUPPLEMENTAL DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED AUGUST 27, 1996

McClatchy Newspapers, Inc., Publisher of The Sacramento Bee *and* Northern California Newspaper Guild, Local 52, the Newspaper Guild, AFL-CIO, CLC, Case 20-CA-21429

August 27, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issue in this proceeding on remand from the United States Court of Appeals for the District of Columbia is whether the Respondent violated Section 8(a)(5) and (1) and 8(d) by unilaterally changing wages of bargaining unit employees after having bargained to impasse on its proposal to institute a wholly discretionary merit pay plan.[1]

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1. On September 27, 1990, the National Labor Relations Board issued its Decision and Order (299 NLRB 1045) in this proceeding finding that McClatchy Newspapers, Inc. (the Respondent), violated Sec. 8(a)(5) and (l) by unilaterally implementing merit pay increases without having previously bargained about the timing and amount of increases.

The Newspaper Guild (the Charging Party) filed, and subsequently withdrew, a petition for review Of the Board's Order with the United States Court Of Appeals for the District of Columbia, and the Board cross-petitioned for enforcement of its Order. Thereafter, in an opinion dated May 15, 1992, the court (separate statements filed by Circuit Judges Edwards and Silberman; Judge Henderson concurring in part and dissenting in part) remanded the (Cont'd)

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The critical facts, as viewed by the court, are summarized below.[2]

Respondent McClatchy Newspapers, Inc., publishes The Sacramento Bee, the largest daily and Sunday newspaper in Sacramento, California. Northern California Newspaper Guild, Local 52, the Newspaper Guild, AFL-CIO, CLC (the Guild), represents several hundred employees in a bargaining unit at this newspaper, including editorial, advertising, and telephone switchboard employees. The parties have had a long-term collective-bargaining relationship, and their most recent collective-bargaining agreement, in effect from April 14, 1984,

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(Cont'd)
case to the Board for further proceedings, consistent with the court's opinion. *NLRB v. McClatchy Newspapers*, 964 F2d 1153 (D.C. Cir. 1992).

By letter dated September 14, 1992, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position with respect to the issues raised by the court's opinion. The Board also granted leave to the Council of Labor Law Equality (COLLE) to file an amicus brief.

The parties and COLLE filed statements of position, the Charging Party and the Respondent filed reply briefs, and the Respondent and COLLE have requested oral argument. The requests for oral argument are denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

2. See *NLRB v. McClatchy*, supra, 964 F.2d at 1154–1155. Our original decision, and the judges decision attached thereto, provide a more detailed description of the pertinent facts.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

to April 13, 1986, provided for salary minimums and step increases according to specified job classifications. The agreement also included a merit increase pay system for each employee who had reached the top of his or her wage schedule and had worked at the newspaper for more than 1 year. This system allowed employees to appeal merit pay determinations and to request Guild representation in this process. The Guild under this agreement had the right to comment generally on the merit review process and it was to be notified within 10 days of the results of any particular evaluation. It was permitted, when requested, to participate in an individual's appeal of a merit increase decision. However, the Respondent retained ultimate discretion over the timing and amount of individual merit increases, and the Respondent's determinations on merit increases were not subject to the collective bargaining agreement's grievance and arbitration provisions.

On February 13, 1986, 2 months before the then-current collective-bargaining agreement was to expire, the parties began negotiations for a successor contract. The parties' wage proposals sought diametrically opposed modifications to the contract provisions. The Guild requested a 25-percent wage increase, elimination of the merit pay system, and integration of cost-of-living adjustments into the step structure, while the Respondent proposed eliminating the guaranteed minimums and the step structure and, as a corollary, sought the right to make merit increases exclusively, without notice to or participation by the Guild.

The parties initially limited bargaining to non-economic issues, but on November 11, 1986, after approximately 20 meetings, the parties returned to the wage proposals. These discussions were not fruitful, and in December the parties

obtained a Federal mediator to assist them in the stalemated negotiations. Bargaining continued into the following February, but no agreement was reached. At the February meeting, the Respondent made a "last, best, and final offer" that would establish guaranteed minimum wages at the current levels and change the wage increase structure so that—with the exception of certain "grandfathered" employees who would be allowed to progress through experience-based steps to the maximum set by the old contract for their job classification—wage increases would be given *only* under the merit increase system. The Guild had previously rejected this proposal because only 10 percent of unit employees (the "grandfathered" employees earning less than the maximum of their previous salary scales) would be guaranteed any wage increase during the term of the agreement, and the Respondent would have virtually total control of any additional increases. The proposal also retained procedural provisions of the existing merit pay plan that exempted all pay decisions under the program from contractual grievance and arbitration procedures and placed other restrictions on the representational role of the Guild in the process.

The Guild rejected the proposal and recommended to its membership that they also act to reject the Respondent's offer. The membership did so. At the parties' last meeting on March 5, 1987, the Guild "made counterproposals, including a return to the combined negotiated wage and merit arrangement in the expired contract." The Respondent countered with a proposal concerning unit exclusions. The parties reached impasse and negotiations ended. The next day, the Respondent posted its merit pay plan and other terms and conditions consistent with its final offer. The merit pay provisions in the posted offer were as follows:

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SECTION 5 *MINIMUM SALARIES*

The publisher and the Guild agree to the following items concerning implementation of the Publisher's merit play plan:

(a) During the life of this Agreement, there shall be no reduction, withdrawal or red circling of merit pay except as provided in Section 3.8.

(b) Merit reviews will be conducted for each employee who has achieved the top minimum salary in his/her classification provided in Section 5 and who has completed at least one year of service with The Sacramento Bee. Merit pay increases will be awarded by department and classification. It is understood that some employees may not receive a merit pay increase.

(c) The Publisher agrees to consider the Guild's comments, suggestions and recommendations about the merit evaluation and appeal processes, including discussions between the Publisher and the Publisher's consultant(s). However, the Publisher is under no obligation to accept those comments, suggestions and recommendations made by the Guild, nor shall those comments, suggestions and recommendations be binding upon the Publisher. To this end, starting in January 1985, the Publisher will meet with a committee of the Guild's choice to discuss the evaluation and appeal processes for each department. If either the Publisher or the Guild requests, the parties agree to meet at least once a

week until work on the evaluation and appeal processes is completed.

(d) April 14, 1985, the Publisher will conduct its merit evaluations of eligible employees. As employees are evaluated, their merit increase, if any, shall go into effect on the date designated by the Publisher. All initial merit evaluations shall be completed by October 11, 1985. Initial evaluations shall be conducted by seniority. The Publisher will notify the Guild within ten (10) calendar days of any evaluation and the evaluation and the results thereof. Any employee who does not receive a merit pay increase will be re-evaluated within three months of his/her initial evaluation or resolution of the appeal, which ever date is later.

(e) If the employee requests, the Guild may participate with the employee in the appeal process. However, the final decision on merit pay increases, if any, shall not be subject to Section 11.

(f) The Publisher will provide the Guild with a list of all bargaining unit employees on the Publisher's payroll as of November 1, 1985. This list will include the amount of merit pay increase, if any, each received. Such list shall be provided no later than November 15, 1985.

(g) Employees below top scale are not precluded from seeking merit increases.[3]

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3. These provisions are identical to sec. 5.0 of the expired contract. Presumably the inclusion of 1985 dates was inadvertent.

Thereafter, the Respondent awarded merit pay increases to individual unit employees without prior notice to or discussion with the Guild.

Following the Respondent's unilateral grant of individual merit increases the Guild filed the instant charges. The administrative law judge found a violation of Section 8(a)(5) and (1), based on his finding, in a subsequently issued errata, on the complaint allegation that the Respondent's merit pay proposal was a permissive, rather than a mandatory, subject of bargaining. The Board affirmed the finding of a violation, but unlike the judge, found merit pay to be a mandatory subject of bargaining. The Board further found that the Respondent's proposal, like the one at issue in its then-recent holding in *Colorado-Ute,*[4] set no criteria for the amounts or timing of merit increases and also failed to provide for Guild participation, either in the initial determination of merit increases granted to particular employees or afterwards through the contractual grievance procedure.[5] The Board accordingly found that the proposal was for unlimited management discretion and was, in reality, seeking the Guild's waiver of its statutory right to be consulted over such matters under Section 8(a)(5) and (1) of the Act. The Board reasoned that, because the Guild had not agreed to the proposal, the Respondent had failed to secure the requisite waiver of the Guild's statutory right to bargain over changes that the

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4. *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991).

5. Any opportunity for the union to participate in the Respondent's appeal process relating to a merit pay award was dependent on the individual employee's inviting the participation of the Guild. As noted above, this appeal process was distinct from and not covered by the established grievance procedures.

Respondent would subsequently make in employee wages. Therefore, the Board found the Respondent was not privileged to proceed with implementation even after impasse, because implementation of the proposal entailed granting particular wage increases unilaterally, without first notifying the Guild and offering it an opportunity to bargain over the timing and amounts of the increases. In concluding that such implementation would violate Section 8(a)(5) (1) of the Act, the Board relied on *NLRB v. Katz*, 369 U.S. 736, 746–747 (1962), and *Oneita Knitting Mills*, 205 NLRB 500, 500 fn. 1 (1973).

The court of appeals, in separate opinions by the judges representing the majority on the panel in this proceeding, relied extensively on *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), and rejected the Board's reliance on the "waiver" theory. The court, as noted, remanded the proceeding for reconsideration by the Board. The Board, having accepted the remand, has reconsidered this case in light of the court's opinion, the parties' statements of position, and COLLE's amicus brief. We adhere to our original position that the merit increase wage proposal was a mandatory subject of bargaining on which the Respondent could lawfully insist to impasse but that implementation nonetheless violated Section 8(a)(5) and (1) of the Act. As set forth below, however, our reasons for finding that implementation was unlawful differ from the Board's original analysis. In brief, we find that preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay.

Appendix C

I. DISCUSSION

A primary objective of the Act is to require labor and management to establish working conditions jointly through the process of collective bargaining. Indeed, Section 9(a) establishes the role of a majority union as the exclusive bargaining representative for all the employees in a particular bargaining unit, and Section 8(a)(5) requires employers to bargain, which is defined in Section 8(d) as follows: "to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment." An employer violates its duty to bargain by changing terms and conditions of employment without prior notice to, or consultation with, the 9(a) bargaining representative.[6]

This case focuses on the parameters of the legal requirements for good-faith bargaining with reference to an employer's reservation of managerial discretion over a mandatory subject of bargaining. This case, however, presents a fact pattern which lodges in the interstices between the type of employer conduct sanctioned as lawful in *American National Insurance,* supra, and the type of employer conduct barred as unlawful in Katz. It is our task to apply the controlling Court precedent in light of the fundamental policies of the Act and to explain why the conduct at issue here is properly deemed unlawful under Section 8(a)(5) of the Act.

In *American National Insurance,* supra, the Supreme Court held that it was lawful for an employer to insist on the retention of discretion under a management rights clause over certain mandatory subjects of bargaining.[7] That case arose in the context of a union's

6. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949).

7. The General Counsel's complaint allegation in this case that (Cont'd)

proposal for unlimited arbitration over all contract matters, and the employer's counterproposal for a management functions clause to exclude promotions, discipline, and work scheduling from arbitration. The Court stated (343 U.S. at 408):

> [T]he Board takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment. An employer would be permitted to bargain as to the content of the standard so long as he agrees to freeze a standard into a contract. Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry.

The Court held, however, (id. at 408–409):

> [T]he Board was not empowered so to disrupt collective bargaining practices. . . .
>
> Whether a contract should contain a clause fixing standards for such matters as work schedules or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter

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(Cont'd)

the Respondent violated Sec. 8(a)(5) of the Act by bargaining to impasse over the merit pay proposal was dismissed by the Board's original order. We note that the dismissal as to that aspect of this case is fully in accord with the Court's opinion in *American National Insurance*.

> approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

The Court in *American National Insurance,* however, was silent as to the questions of both implementation and impasse—i.e., implementation when the employer's proposed approach is *not* "agreed upon" at the bargaining table—and implementation upon impasse is the question now before the Board.

Katz, supra, on the other hand, involved the question of implementation of proposals involving mandatory subjects in the absence of bargaining impasse. The Court's opinion in *Katz* held that an employer violated Section 8(a)(5) while engaged in bargaining over terms and conditions of employment, because it unilaterally granted automatic and merit wage increases to unit employees while proposals regarding these subjects were still on the bargaining table and the parties had not reached an impasse in bargaining. In particular, the Court held that the employer's unilateral grant of merit increases to unit employees violated Section 8(a)(5) unless they were shown to be in line with the employer's longstanding practice of merit reviews, and, in effect, a mere continuation of the status quo. Noting that the merit raises were informed by a large measure of discretion, the Court found that "there simply is no way for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." 369 U.S. at 746–747.

Although *Katz* does not hold that employer bargaining proposals for merit increases must themselves include

procedures and criteria, the Court's introductory invocation of "the statutory objective of *establishing* working conditions through bargaining" (id. at 744, emphasis added), stands at odds with any assertion that an employer should be able, by means of a unilateral implementation following impasse of its discretionary merit wage proposal, to institute a practice of periodically granting such wage increases without any known procedures or criteria for reaching these determinations. When a union has withheld its agreement to such a wage increase system, the employer's subsequent unilateral determinations making changes in the wages of individual unit employees amount to changes in terms and conditions of employment that are made totally outside the collective-bargaining process. Accordingly, the Respondent's contention that this conduct is permissible, gains little support from the Court's opinions in *American National Insurance* and *Katz,* which converge on the principle that the collective-bargaining process is the primary vehicle for establishing working conditions.

The Board, subsequent to the Court's opinions cited above, applied the *Katz* Court's reasoning in *Oneita Knitting Mills,* 205 NLRB 500 fn. 1 (1972), finding that a bargaining agent is entitled to be consulted prior to the employer's implementing a practice or program of merit increases (to the extent that discretion has existed in determining the amounts or timing of such increases), even if the program was originally developed before the union became the employer's representative.[8]

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8. More recently, in *Daily News of Los Angeles, 315* NLRB 1236, 1239-1241 (1994), in response to a court remand, the Board discussed at length the reasoning of *Oneita Knitting Mills* as it applied to an employer's unilateral *discontinuance* of a merit wage increase system. The Board's decision on remand was enforced by the reviewing court. 971 F.3d 619 (D.C. Cir. 1966).

Appendix C

Implicit in the court's remand to the Board in the present case is the court's perception of tension between the above-mentioned precedents and the deference reviewing courts owe to the Board's role in reconciling the conflicting interests of labor and management.[9] The court's remand contains numerous suggestions for reconciling these conflicting principles, which we have considered along with the relevant precedent and statutory objectives. One of the court's suggested areas for clarification, and the one we find to be the most appropriate and practical, relates to the proper operation of the impasse doctrine.

II. IMPLEMENTATION AFTER IMPASSE DOCTRINE

When an impasse in bargaining is reached, the duty to bargain is not terminated but only suspended.[10] However the fact of impasse enables the employer to make unilateral changes in working conditions that are "not substantially different or greater than any which the employer . . . proposed during the negotiations." [11]

Impasse, in effect, temporarily suspends the usual rules of collective bargaining, by enabling the interjection of new terms and conditions into the employment relationship even though no agreement was reached through the prescribed collective-

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9. See, e.g., *NLRB v. J. Weingarten*, 420 U.S. 251, 267 (1975); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. McClatchy*, 964 F.2d at 1172.

10. *NLRB v. Tex-Tan*, 318 F.2d 472 (5th Cir. 1963).

11. *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

bargaining process. As the Supreme Court in *Bonanno Linen*[12] observed:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

In short, the impasse doctrine is designed, in part, to allow an employer to exert unilateral economic force by establishing new terms and conditions of employment as set out in the employer's bargaining proposals. However, the impasse is always viewed as a temporary circumstance, and the impasse doctrine allowing implementation of employer proposals is legitimated only as a method for breaking the impasse. The parties, thus remain obligated to continue their bargaining relationship and attempt to negotiate an agreement in good faith. The impasse doctrine, therefore, is not a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective-bargaining process.[13]

We note that the rule permitting implementation after impasse has not been universally applied to allow the

12. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1981).

13. See *NLRB v. Crompton-Highland Mills*, supra, 337 U.S. at 224.

implementation of every employer proposal on a mandatory subject. As Judge Silberman observed in his separate statement in this case (964 F.2d at 1177 [emphasis in original]):

> [[I]n *Litton Financial Printing Division v. NLRB*, [501 U.S. 190] (1991), the Court recognized that certain types of proposals—in *Litton it* was an arbitration clause—are contract-dependent and may not be imposed absent consent. See id. at [199-201]. This necessarily means that such provisions are outside not only the ban on pre-impasse unilateral changes at issue in *Litton*, but also the privilege of unilateral implementation *after* impasse.

We do not consider or express judgment about the contract dependent analysis employed by Judge Silberman. But it is important to note that in numerous instances, it is clear that application of implementation after impasse is not permissible regarding specified proposals.[14] In particular, certain contract proposals, in addition to arbitration, constituting mandatory subjects of bargaining—even those that had been agreed to by the same parties in their expired agreements—e.g., union-security and dues checkoff,[15] and no-strike provisions[16] are "contract bound" or involve a "statutorily guaranteed right" and could not appropriately be unilaterally thrust upon a party without its agreement to be bound. In still another case, the

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14. See generally *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198-201 (1991).

15. *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).

16. *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

Board and the Court decided that permitting impasse to justify an employer's withdrawal from multiemployer bargaining did not effectuate the statutory objectives.[17]

The above summary of existing precedent is aptly reflected in Judge Edwards' separate statement in this case that (964 F.2d at 1154):

> [T]he [Supreme] Court has ruled that there are certain, limited categorical exceptions (covering the statutory right to strike, extensions of arbitration beyond the term of an agreement, union security, and withdrawal from multiemployer bargaining) which are beyond the scope of the impasse rule.

Indeed, the situation here is analogous to the situation in which the Board is obliged to weigh the right of the parties to a bargaining relationship to reach their own agreement without Board intervention, at least as to their collective-bargaining contract's substantive terms, against the obligation of the parties to proceed in good faith with the process of collective bargaining. The Supreme Court declared in no uncertain terms that the Board may not "either directly or indirectly . . . sit in judgment upon the substantive terms of collective-bargaining agreements." *American National Insurance,* 343 U.S. at 404. Yet, the Board has held, with court approval, that even though a bad-faith refusal to bargain violation may not be based solely on the substantive content of an employer's bargaining proposals, those bargaining proposals can constitute evidence of bad-faith bargaining. See, e.g., *John Ascuaga's Nugget,* 298 NLRB 524, 527 (1990); *Reichhold Chemicals,* 288 NLRB 69

17. *Bonanno Linen,* 454 U.S. at 412.

(1988), enf. granted and modified 906 F.2d 719 (D.C. Cir. 1990); *Mar-Len Cabinets*, 243 NLRB 523, 535–536 (1979), enfd. as modified 659 F.2d 995 (1981). It is clear that these various exceptions to the hard-and-fast rules of *Katz* and *American National Insurance* have been found necessary to prevent the gutting of the collective-bargaining process. Thus, the above exceptions to the implementation-after-impasse doctrine carry as their underlying theme the need to foster the collective-bargaining process. This is the theme that we articulate here and apply to the instant case.

In light of the foregoing discussion of the impasse doctrine, it remains for consideration how the Respondent's merit pay proposals, to which the parties had lawfully bargained to impasse, fit into a lawful collective-bargaining relationship. Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the Employer could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria,[18] the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process."[19] As explained below, we find that if the Respondent was granted carte blanche authority over wage increases (without

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18. In all likelihood, the Respondents' method of determining merit increases would not be wholly arbitrary, but under its proposal there would be no need to state during implementation the standards or criteria utilized in setting these increases.

19. *Bonanno Linen*, supra, 454 U.S.. at 412. See also *American Ship Building Co. v. NLRB*, 380 U.S.. 300, 309 (1965) (suggesting that bargaining tactics may he analyzed for an inherent tendency to "destroy the unions' capacity for effective and responsible representation").

limitation as to time, standards, criteria, or the Guild's agreement), it would be so *inherently* destructive[20] of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.

Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wages rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases. The frequency, extent, and basis for these wage changes would be governed only by the Respondent's exercise of its discretion.[21] The Respondent's ongoing ability to exercise

20. We invoke this phrase from *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), to the same purpose signified there, i.e., to indicate that the conduct carries with it foreseeable consequences that establish, without more, proof of an unlawful motive.

21. Any forbearance on the Respondent's part in implementing a merit pay increase would not serve to show that its discretion was thereby limited or that the implementation of its full bargaining proposal was thereby retracted.

its economic force in setting wage increases and the Guild's ongoing exclusion from negotiating them would not only directly impact on a key term and condition of employment and a primary basis for negotiations,[22] but it would simultaneously disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment.

Nothing in our decision precludes an employer from attempting to negotiate to agreement on retaining discretion over wage increases. And, absent success in achieving such an agreement, nothing in our decision precludes an employer from making merit wage determinations if definable objective procedures and criteria have been negotiated to agreement or to impasse. However, the present case represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation. Where the Guild agrees to grant the employer discretion over wages, or where agreement or impasse on definable objective procedures and criteria provides the basis for unilateral implementation, the Guild retains its ability to act as the employees' bargaining representative. However, by design or default, the Respondent's open-ended, intermittent disruption of collective bargaining by means of the implementation of a proposal for repeatedly shifting wage rates with no objective basis and without the Guild's participation fully bypasses the Guild in its role as employee bargaining representative. Such a result would be

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22. The paramount importance of wages as a mandatory subject of bargaining is readily demonstrated by its placement at the beginning of the statutory (8(d)) requirement that parties "confer in good faith with respect to wages, hours, and other terms and conditions of employment" (emphasis added).

antithetical to our statutory system of collective bargaining meant to promote industrial stability.[23]

In sum, it is not the Respondent's bargaining proposal that we view as inimical to the policies of the Act, but its exclusion of the Guild at the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan, when the Guild has not agreed to relinquish its statutory role. The impasse in this case occurred not with respect to the establishment of specific working conditions according to the Respondent's proposal, but more generally resulted from the employer's insistence that it not be restricted in exercising its discretion in the overall process of setting wage increases generally. As the Court has stated in *Katz*, the retention of a "large measure of discretion" as to merit wage increases allows the Guild to insist on negotiations as to procedures and criteria. 369 U.S. at 746.[24] In the case at hand, no such substantive negotiations ever occurred. We further note that the Respondent's disregard of the Guild's role as employee bargaining representative is reflected not only in its refusal to allow the Guild to negotiate procedures and criteria prior to its implementation of what remained a fully discretionary merit pay plan, but is also further shown by its

23. Indeed, the Court specifically recognized, in *Katz*, that "the Board is authorized to order the cessation of behavior which . . . directly obstructs or inhibits the actual process of [collective-bargaining]." 369 U.S. at 747 (emphasis in original).

24. The Court's rationale in *Katz* strongly suggests that a wholly discretionary merit wage policy (i.e., without identifiable procedures and criteria) does not itself "establish" terms and conditions of employment at any point prior to the actual exercise of this discretion in setting discrete wage rates for unit employees. Id. at 746–747. Accord, *Daily News of Los Angeles*, supra, 315 NLRB at 1239–1241.

refusal to provide the Guild with any notice of the forthcoming specific merit wage increases or to allow the Guild any right to participate in any employee appeal of merit pay other than those to which it is invited by the individual employee. Even where such participation would be allowed, the Guild's input could be ignored.

In applying our decision here to the facts of this case, we are preserving an employer's right to bargain to impasse over proposals to retain management discretion over merit pay while, at the same time, maintaining the Guild's opportunity to negotiate terms and conditions of employment. In striking this balance, we are mindful of the Supreme Court's admonition that it is not our role "to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [our] assessment of that party's bargaining power." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965). But, as the Court also noted in *American Ship*, it is our responsibility to assure that particular conduct of a party is not "destructive of collective-bargaining." Id at 309. We are confident that this modification of the impasse doctrine will maintain a proper balance, designed to further the bargaining process, between the competing legitimate interests[25] of the parties by preserving the employer's right to propose and bargain to impasse over merit pay and the obligation to provide the employees' statutory bargaining agent with the opportunity for negotiation over the terms and conditions of employment.[26]

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25. [T]he Board should balance conflicting legitimate interests. . . . *Bonanno Linen*, supra, 454 U.S.. at 416.

26. Those portions of the scares earlier decisions in *Hyatt*

(Cont'd)

Appendix C

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Hotels Corp., 296 NLRB 289 (1989), enfd. on other grounds 939 F.2d 361 (6th cir. 1991), and *Presto Casting Co.*, 262 NLRB 346 (1982), enfd. in part and enf. denied in part on other grounds 708 F.2d 495 (9th Cir. 1983, cert. denied 464 U.S. 994 (1983), that are contrary to the foregoing rationale and the result reached in *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), and progeny, are hereby overruled.

Appendix C

ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 299 NLRB 1045 (1990), and orders that the Respondent, McClatchy Newspapers, Publisher of The Sacramento Bee, Sacramento, California, its officers, successors, and assigns, shall take the action set forth in that Order.

MEMBER COHEN, dissenting.

From the earliest days of the Act, it has been well-established doctrine that a party is free to implement its final offer after reaching a good-faith impasse in bargaining.[1] In the instant case, that is precisely what Respondent has done. Consistent with these established legal principles, I would find no violation. Contrary to these established principles, the Board finds the violation.

The Board has previously reached this result. However, it has failed to persuade the two circuit courts that have considered the matter.[2] My colleagues now try a different rationale to reach the same result. For the reasons set forth below, it is clear that the new effort fares no better than the prior ones.

During bargaining, the Respondent proposed a merit increase system under which it would retain discretion as to the timing and amount of merit increases. My colleagues do not

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1. See Gorman, *Basic Text on Labor Law*, 1976, pp. 445–447; Hardin, *The Developing Labor Law*, pp. 598, 640.

2. *NLRB v. McClatchy Newspapers*, 964 F.2d 1153 (D.C. Cir. 1992); *Colorado-Ute Electric Assn. v. NLRB*, 939 F.2d 1392 (10th Cir. 1991).

quarrel with the propositions that the proposal was a mandatory subject of bargaining and that the Respondent was free to insist upon the proposal to the point of impasse. As the Supreme Court explained in *NLRB v. American National Insurance* Co., 343 U.S. 395 (1952), collective bargaining can result in fixed terms and conditions of employment *or* in discretion as to terms and conditions of employment. Nor do my colleagues quarrel with the proposition that a good-faith impasse was reached in this case.[3] Finally, my colleagues agree that the Respondent implemented its last proposal, i.e., the one that gave the Respondent unilateral control over merit increases. Notwithstanding all of this, my colleagues somehow find that a violation occurred when the Respondent implemented and acted upon the proposal.

The rule regarding implementation after impasse is grounded in the statute and in sound public policy. Since the employer has satisfied its bargaining obligation (by bargaining to impasse), there is no statutory impediment to employer action. And, as a policy matter, it makes no sense to require the employer to freeze indefinitely the preimpasse status quo. Rather, *it* makes sense to permit legitimate business changes after bargaining requirements have been fulfilled.

In addition, the freedom to make postimpasse changes is a legal weapon that can be used in bargaining, just as a strike and lockout can be used as weapons.[4] Such weapons are an important

3. Thus, *NLRB v. Katz* 369 U.S. 736 (1962), and *Oneita Knitting Mills*, 205 NLRB 500 (1973), are clearly distinguishable. There was no impasse in those cases.

4. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965); *Colorado-Ute v. NLRB*, supra; *Brown v. Pro Football, S. Ct.* No. 95-388 (June 20, 1996).

part of the bargaining process, and the Board is not to be the arbiter of their use.[5]

My colleagues correctly say that there are exceptions to the rule permitting implementation after impasse. However, these exceptions are few in number, and they pertain to subjects which are clearly different from the one involved herein. Thus, for example, the 8(a)(3) proviso forbids union-security obligations in the absence of a contract. Accordingly, union security cannot be unilaterally implemented, before or after impasse, in the absence of a contract.[6] Further, since checkoff is closely related to union security, it too has long been held to be unilaterally terminable at the end of the contract.[7] Finally, arbitration is entirely a creature of consent, and thus it terminates upon the expiration of the contract. These "contract bound" provisions are different from merit pay provisions. The latter are not dependent upon a contract.

Arguably, a closer analogy to the instant proposal is a no-strike clause. That is, an employer can insist to impasse on such a clause (i.e., the waiver of the right to strike), but it cannot unilaterally impose the waiver even after impasse. By analogy, it can theoretically be argued chat an employer can insist to impasse on a discretionary merit pay proposal (i.e., the waiver of the right to bargain about merit pay), but it cannot unilaterally impose the waiver even after impasse. Whatever the possible merit of this argument, it has been rejected by the two courts that have considered it, and my colleagues properly eschew it.[8]

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5. *American Ship Building Co.*, supra.

6. *Bethlehem Steel*, 136 NLRB 1500 (1962).

7. Id.

8. *NLRB v. McClatchy Newspapers*, supra; *Colorado-Ute v. NLRB*, supra.

Appendix C

My colleagues rely upon *Great Dane*[9] and contend that the Respondent's proposal is "inherently destructive" of the right to bargain. However, the *Great Dane* doctrine pertains to an 8(a)(3) analysis. It is a means of establishing motive where evidentiary proof thereof may be lacking. I fail to see how this 8(a)(3) "motive" analysis has anything to do with this 8(a)(5) case which does not turn on motive. In addition, it is difficult to say chat the Respondent has "inherently destroyed" the right to bargain. It has bargained in good faith on the merit pay proposal. The union was free to strike in opposition thereto. It did not do so, and apparently lacked the bargaining strength to gain a withdrawal of the proposal. Under the law, as explained above, the Respondent was therefore free to implement its proposal after impasse.

My colleagues object to the proposal because of the degree of discretion retained by Respondent with respect to merit pay. However, as *American National Insurance* makes clear, chose matters are the stuff of collective bargaining. It is not the business of the Board to judge the proposal. So long as the proposal has been subjected to good-faith bargaining, and impasse has been reached, there is no basis for objecting to its implementation.

In sum, my decision is based upon my respect for the process of free collective bargaining. That process is founded upon the principle of good-faith bargaining, without governmental intrusion, and chat process permits parties to act after the bargaining obligation has been met. In deference to chat process, I dissent.

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9. *NLRB v. Great Dane Trailers.* 388 U.S. 26 (1967).

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED MAY 15, 1992

NATIONAL LABOR RELATIONS BOARD, Petitioner,

and

Northern California Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, CLC, Intervenor,

v.

McCLATCHY NEWSPAPERS, INC. PUBLISHER OF THE SACRAMENTO BEE, Respondent.

No. 90-1602.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 3, 1992.

Decided May 15, 1992.

As Amended June 17, 1992.

Rehearing and Rehearing En Banc
Denied July 23, 1992.

Union filed unfair labor practice charge against employer after employer unilaterally implemented merit increase proposal previously rejected by union. The National Labor Relations Board (NLRB) found that employer had committed unfair labor practice. Employer petitioned for review and NLRB cross-

petitioned for enforcement. The Court of Appeals held that NLRB's finding was not adequately supported by past NLRB and court interpretations of Act.

Petition denied and case remanded.

Harry T. Edwards, Circuit Judge, concurred and filed an opinion.

Silberman, Circuit Judge, concurred and filed an opinion.

Karen LeCraft Henderson, Circuit Judge, concurred in part and dissented in part and filed an opinion.

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On Application For Enforcement of an Order of the National Labor Relations Board (No. 20-CA-21429).

* * *

Before EDWARDS, SILBERMAN & HENDERSON, Circuit Judges.

Separate statements filed by Circuit Judge HARRY T. EDWARDS, Circuit Judge SILBERMAN and Circuit Judge KAREN LeCRAFT HENDERSON.

ORDER

PER CURIAM.

The National Labor Relations Board ("Board") petitions for enforcement of its decision in *McClatchy Newspapers, Inc.*, 299 N.L.R.B. No. 156 (1990). A majority of the panel holds

that the Board's justification for its finding that "the Respondent's failure to bargain with the Union about the timing and amount of merit increases constitutes a violation of Section 8(a)(5) and (1) of the [National Labor Relations] Act," *id.* at 7, does not constitute reasoned decisionmaking under past Board and court interpretations of the Act. Judge Silberman believes that the Board's explanation is inadequate under those precedents. We therefore deny the petition for enforcement. Judge Edwards and Judge Silberman agree that the case must be remanded to the Board for further consideration.

Set out below are statements of Judge Edwards and Judge Silberman, who separately concur in this order. Also set out below is a statement of Judge Henderson, who concurs in the denial of the petition for enforcement but dissents from the decision to remand the case to the Board.

So Ordered.

HARRY T. EDWARDS, Circuit Judge:

The National Labor Relations Board ("NLRB" or "Board") petitions for enforcement of an order finding that McClatchy Newspapers, Inc. ("Newspaper" or the "employer") violated sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 158(a)(1), (5) (1988). In negotiations with the union representing a unit of its employees, McClatchy proposed a merit pay system that was designed to give the employer virtually complete, unilateral control of all employee salaries. Employer and union representatives bargained in good faith to impasse over the proposal; following impasse, the Newspaper implemented the proposal and awarded merit pay increases to selected employees. The Board found

this to be a violation of the duty to bargain over individual wages.

The precise issue to be resolved in this case is whether, after bargaining in good faith to impasse, an employer may unilaterally implement a merit pay proposal and, pursuant thereto, change individual employees' wage rates without further notice to or bargaining with the union. While seemingly narrow in scope, this is a deceptively difficult question, reaching to the heart of labor law. And, although this particular question only recently has been raised, it occupies a space between several well-established doctrines of labor law. First, proposals covering wages (including systems of merit pay) are mandatory subjects of bargaining, with respect to which the parties must bargain in good faith in an effort to reach agreement. Second, even when a party is guilty of bad-faith bargaining, the Board may not compel either side to accede to a particular proposal. Third, following good-faith negotiations, the impasse rule applies and a party generally may take unilateral action with respect to a mandatory subject of bargaining over which impasse has been reached. Fourth, the Supreme Court has held that unilateral action may not be taken with respect to nonmandatory subjects of bargaining; furthermore, the Court has ruled that there are certain limited, categorical exceptions (covering the statutory right to strike, extension of arbitration beyond the term of an agreement, union security, and withdrawal from multiemployer bargaining) which are beyond the scope of the impasse rule.

In this case, the Board ignored the impasse rule; but, in finding the employer guilty of a refusal to bargain, the Board neither claimed to rely on any explicit statutorily-protected right, nor did it purport to hold that merit pay warranted status as a categorical exception to the impasse rule. Rather, the Board, in

a wholly unconvincing opinion, rested on a badly misguided theory of "waiver," holding that the Newspaper was guilty of an unfair labor practice because it had acted without securing a necessary waiver of the union's right to bargain with regard to each individual employee's merit increase.

On the present record, I agree that we cannot enforce the Board's order. The result reached by the Board is arguably defensible; but it rests on a completely inadequate theory and fails to recognize the settled legal doctrines which bound this case.

BACKGROUND

The essential facts in this case are undisputed and can be found in the NLRB's decision below, *McClatchy Newspapers, Inc.*, 299 N.L.R.B. No. 156 (1990), *reprinted in* Joint Appendix ("J.A.") 311. The following brief summary is offered merely to put the case in focus.

McClatchy Newspapers, Inc. is the publisher of the *Sacramento Bee*, the largest daily and Sunday paper in Sacramento, California. Northern California Newspaper Guild, Local 52 (the "Guild"), represents several hundred editorial, advertising and telephone switchboard employees at the *Bee*. The parties have had a collective bargaining relationship for nearly 50 years, *McClatchy Newspapers*, CA No. 21429, at 2 (ALJ decision), J.A. 324 ("*ALJ Decision*"), and their most recent collective bargaining agreement, in effect from April 14, 1984, to April 13, 1986, provided for minimum salaries and step increases for each of several job classifications. The agreement also included a merit pay system for employees who had reached the top step of their classification and had worked at the *Bee*

for more than one year. Although the Guild had the right to comment on the merit review and appeals process, the Newspaper retained ultimate discretion over the timing and amount of individual merit pay increases.[1] Additionally, while an employee could request union representation in an appeal over a merit pay decision, the Newspaper's judgments on merit increases were not subject to the collective bargaining agreement's grievance and arbitration provisions.

On February 13, 1986, two months before the extant collective bargaining agreement was to expire, the parties began negotiations with an eye toward a new contract. The initial wage proposals were diametrically opposed: the Guild requested a 25% wage increase, elimination of the merit pay system, and integration of cost-of-living adjustments into the step structure; the Newspaper proposed eliminating the guaranteed minimums and the step structure and sought to use merit increases exclusively, without notice to or participation by the Guild.

The parties quickly agreed that they should begin with noneconomic issues and return to economic issues later. After approximately 20 meetings, on November 11, 1986, the parties again took up the wage proposals. The Newspaper and Guild positions remained far apart, and in December the parties invited a federal mediator to participate in the stalemated negotiations. The parties continued to bargain in good faith in the presence of the mediator in January and February, but no agreement could be reached. At the February meeting, the Newspaper made a "last, best and final offer" that would have set guaranteed minimum wages at the current levels and would have "grandfathered" existing employees at the top step of the old wage structure. The Guild previously had rejected this proposal

1. The merit pay program could not be used to decrease wages

because only 10% of unit employees would be guaranteed salary increases, leaving substantially all salary adjustments within the employer's merit pay plan. As under the old merit pay program, the Guild would not have the right to comment on individual employees before their merit reviews were completed. Employees also could not grieve or arbitrate disagreements with the Newspaper's judgments on merit increases.

The union rejected the proposal and recommended to its membership that it vote against the Newspaper's offer. The membership did so. At the parties' last meeting on March 5, 1987, the Guild "made counterproposals, including a return to the combined negotiated wage and merit arrangement in the expired contract." *McClatchy Newspapers,* 299 N.L.R.B. No. 156, at 3, J.A. 313. The Newspaper countered with a proposal concerning unit exclusions. The parties reached a deadlock and negotiations were terminated. The next day, the Newspaper posted its merit plan and other terms and conditions consistent with its final offer. "Subsequently, the [Newspaper] granted merit pay increases to some unit employees without prior discussion with the Union." *Id.*

After individual merit increases were implemented without union consent, the Guild filed an unfair labor practice charge with the NLRB. The charge initially was dismissed, but the NLRB's National Appeals Office ordered it reinstated. Thereafter, an Administrative Law Judge found for the Guild and the Newspaper appealed to the Board. The Board also found for the Guild, but on substantially different grounds than the ALJ. The Board first concluded that the Newspaper, despite bargaining hard for discretion over wages, was not guilty of bad-faith negotiations. "[T]he evidence in this case is most consistent with the finding that the parties had engaged in in-

depth, good-faith negotiations, and shared a contemporaneous understanding that they had reached an impasse in bargaining on the crucial issue of negotiated wages versus merit pay." *Id.* at 4, J.A. 314. The Board also held that "merit pay is a mandatory bargaining subject on which a party may lawfully insist to impasse." *Id.* at 5, J.A. 315.

Relying on its decision in *Colorado-Ute Electric Association,* 295 N.L.R.B. No. 67 (1989), *enforcement denied,* 939 F.2d 1392 (10th Cir.1991), *petition for cert. filed,* 60 U.S.L.W. 3582 (U.S. Feb. 25, 1992) (No. 91-1284), however, the Board held that the Newspaper committed an unfair labor practice by unilaterally granting *individual* merit pay increases, even though it had bargained to impasse with the Guild over the proposed plan which was designed to give the employer virtually unfettered control over merit pay. The Guild petitioned for review and the Board petitioned for enforcement. The Guild has since withdrawn its petition.

Courts of appeals review the Board's factual determinations for "substantial evidence." N.L.R.A. § 10(e), 29 U.S.C. § 160(e) (1988). Our review of the Board's judgment on questions of law is also well established:

> Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. *NLRB v. Irons Workers,* 434 U.S. 335, 350 [98 S.Ct. 651, 660, 54 L.Ed.2d 586] (1978). In the past we have refused enforcement of Board orders where they had "no reasonable basis in law," either because the proper legal standard was not

> applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning. *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 [92 S.Ct. 383, 390, 30 L.Ed.2d 341] (1971). We have also parted company with the Board's interpretation where it was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 [85 S.Ct. 955, 967, 13 L.Ed.2d 855] (1965).

Ford Motor Co. v. NLRB, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42, 107 S.Ct. 2225, 2235, 96 L.Ed.2d 22 (1987) ("The Board, of course, is given considerable authority to interpret the provisions of the NLRA. If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts. Moreover, if the Board's application of such a rational rule is supported by substantial evidence on the record, courts should enforce the Board's order.") (citations omitted); *NLRB v. Financial Inst. Employees, Local 1182*, 475 U.S. 192, 202, 106 S.Ct. 1007, 1013, 89 L.Ed.2d 151 (1986) ("Our cases have previously recognized the Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act. . . . [But,] [d]eference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.' ") (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965)).

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On these facts, and with this standard of review in mind, I now turn to the issues presented.

ANALYSIS

I. *Introduction*

Because this case potentially implicates fundamental issues of labor law, and because it occupies a place between major labor doctrines, I believe the issues should be addressed comprehensively. I also do so because the Board's decision is totally lacking in its consideration of settled law. While this law arguably does not command a result opposite the Board's, it strongly implies one, and the Board has not yet adequately justified its reasoning.

Under the NLRA, the parties to a recognized or certified bargaining relationship have a duty to bargain over "mandatory" subjects—those aspects of the employment relationship falling within the statutory phrase "wages, hours, and terms and conditions of employment." In addition to mandatory subjects, the parties may mutually agree to bargain over and reach agreement on "permissive subjects," *i.e.*, those matters which, although not within the compass of wages, hours or conditions of employment, are lawful subjects of bargaining. Merit pay proposals have long been considered mandatory subjects of bargaining, as indeed a plain reading of the term "wages" would indicate.

With regard to mandatory subjects, a union and an employer have a duty to bargain in good faith. Employers may not make unilateral changes in mandatory subjects of bargaining until they have satisfied their duty to negotiate. Nonetheless, because

neither side is bound to reach an agreement, and the statutory scheme assumes that economic weapons will at times be used by both sides, the parties may bargain to impasse over mandatory subjects—including proposals that seek to win unilateral discretion for one side over a mandatory subject. Generally, once the parties reach a good-faith impasse, the duty to bargain is at least temporarily suspended, and the parties, typically the employer, may enact any change in a mandatory subject reasonably contained within its final proposal.

Here, the Board, despite the foregoing, held that McClatchy violated its duty to bargain when it unilaterally granted merit increases to some employees after reaching a good-faith impasse over a discretionary merit pay proposal. In so finding, the Board followed its decision in *Colorado-Ute Electric Association*, 295 N.L.R.B. No. 67 (1989), which the Tenth Circuit recently declined to enforce, *Colorado-Ute Elec. Ass'n v. NLRB*, 939 F.2d 1392 (10th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3582 (U.S. Feb. 25, 1992) (No. 91-1284). The Board reasoned that the employer had violated its duty to bargain because it had failed to secure a necessary waiver of the union's right to bargain with regard to each individual employee's merit increase.

The articulated waiver rationale fails to justify the Board's result. Generally, the "waiver" cases to which the Board alludes address a substantially different facet of the employer/union relationship than the one here at issue; they most often arise during the pendency of a collective bargaining agreement and focus on whether a union has given its assent (or waived objections) to unilateral employer action. In these so-called "waiver" cases, the employer typically acts on a claim of contractual authority, or pursuant to asserted reserved rights, under the parties' existing collective bargaining agreement; thus,

in such cases, the employer usually does not bargain before taking the specific action. By contrast, the Board here found that McClatchy bargained in good faith with the union over the merit pay proposal and that the parties had reached impasse. Furthermore, suggestions in the "waiver" cases that the employer may never take unilateral action without the union's consent do not apply here; that result derives from the effect of "zipper clauses" found within collective bargaining agreements. These clauses integrate all mandatory subjects of bargaining into the agreement and, when they are present, neither side can take unilateral action on a mandatory subject absent express or implied authority under the agreement, and neither side can force bargaining over any topic.

The Board's decision as presently justified is neither rational nor consistent with the Act. Nonetheless, I agree that we must remand this case for further proceedings because the Board might be able to justify the result reached in this case pursuant to an alternative legal and theoretical framework, *i.e.*, a framework that admits of coherent treatment of established legal doctrine or that legitimately explains a departure therefrom.

For example, the Board might be able to classify the unilateral merit pay proposal here—where the employer retains the exclusive right to bargain with individual employees—as a permissive subject of bargaining. Or, the Board might follow up on its counsel's suggestion that, somehow, "merit pay is different," thus justifying treatment (like arbitration) as a categorical exception to the impasse rule. Or, the Board might attempt to justify a new category of subjects placed somewhere between "mandatory" and "permissive." The category might include those proposals by which one side seeks unfettered unilateral discretion over a mandatory subject of bargaining.

The parties would be permitted to go to impasse over the proposal but would not be permitted to implement case-specific examples of the discretionary policy without at least prior notice to the other side.

It is unclear whether the Board will be able to justify the result in this case on any of the foregoing theories (or on any other theories not mentioned). As the Tenth Circuit noted in denying enforcement in *Colorado-Ute,* there is good reason to be skeptical of the Board's decisions in these cases: the Board's so-called waiver theory is a farcical misapplication of the law, and the Board thus far has failed to sort certain long-standing and heretofore predominant labor law doctrines that run counter to its position. Nonetheless, the Board's position is not unfathomable; to date, it is merely unjustified and only arguably unjustifiable. Therefore, it is appropriate that we withhold final judgment until after the Board has taken the opportunity to explore whether it can find a coherent niche within the fabric of established labor law for the result here urged. In this opinion, my mission will be to highlight the numerous analytical problems that will face the Board on remand.

II. *The Duty to Bargain and the Right To Implement upon Impasse*

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1988). Section 8(d) defines collective bargaining as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith

> with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating such agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

29 U.S.C. § 158(d) (1988).[2]

A. *Mandatory Subjects of Bargaining*

As evidenced by the plain language of section 8(d), the duty to bargain arises with regard to "wages, hours, and other terms and conditions of employment." "The duty is limited to those subjects, and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958) (citation omitted) ("*Borg-Warner*"). Therefore, the first question in a duty to bargain case is whether the matter in dispute is a "mandatory subject of bargaining."

1. *Mandatory Subjects in General and the Concern Over Direct Dealing.*

Mandatory subjects generally are those which "regulate[] the labor relations between the employer and the employees."

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2. Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the right[ ]" to organize and act collectively. 29 U.S.C. § 158(a)(1) (1988); *see also* 29 U.S.C. § 157 (1988) (employees' rights to organize and to act collectively).

Borg-Warner, 356 U.S. at 350, 78 S.Ct. at 723. By contrast, matters that "dealt[] only with relations between the employees and their unions" or "substantially modif[y] the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees," *id,* constitute permissive subjects that the employer may propose but may not insist upon, *id* at 349, 78 S.Ct. at 722.

At the outset, it should be noted that a mandatory subject of bargaining does not lose status as such if one party seeks to gain complete control over the subject pursuant to collective bargaining. Thus, it is now well settled that proposals by which one side would retain discretion over a mandatory subject are also mandatory subjects. In *NLRB v. American Nat'l Ins. Co.,* 343 U.S. 395, 407-09, 72 S.Ct. 824, 831-32, 96 L.Ed. 1027 (1952), the Supreme Court held that the Board exceeded its authority by holding that "an employer could 'propose' such a [management discretion] clause [b]ut . . . [could not] bargain[] for any such clause when the Union declines to accept the proposal." *Id.* at 408, 72 S.Ct. at 831. Rather, whether the subject will be committed to one party's discretion or set by definite terms should be decided by bargaining and the relative economic strength of the employer and union.

> Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment is an issue for determination across the bargaining table, not by the Board. . . . Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se,* an unfair labor practice.

Id. at 409, 72 S.Ct. at 832.

This of course suggests that if *merit pay is* a mandatory subject of bargaining, then an employer may through collective bargaining attempt to gain discretionary control over its implementation. The issue raised in this case thus seems easy until one considers certain arguably countervailing legal doctrines under the NLRA.

A problem arises when an employer's proposal seems, on its face, to address "wages, hours, [or] other terms and conditions of employment," but the proposal includes direct dealing between the employer and individual employees or it otherwise seeks to evade lawfully prescribed arrangements in a recognized or certified bargaining relationship. In such situations, the proposal may constitute only a permissive subject. For example, in *Borg-Warner,* the employer insisted to impasse over proposals that would have required a secret employee vote on the employer's bargaining offer prior to a strike and that would have recognized an uncertified local affiliate as the employees' exclusive representative, instead of the International Union which the Board had certified. The Court found both to be permissive subjects: the first "enable[d] the employer, in effect, to deal with its employees rather than with their statutory representative," 356 U.S. at 350, 78 S.Ct. at 723; the second was "an evasion" of the duty to bargain with the employee's certified representative, *id.*

Recent cases echo these two concerns. *Toledo Typographical Union No. 63 v. NLRB,* 907 F.2d 1220 (D.C.Cir.1990), *cert. denied,* __ U.S. __, 111 S.Ct. 767, 112 L.Ed.2d 786 (1991) ("*Toledo Blade*"), is an example of the first; there, the employer proposed to bargain with individual employees over retirement buyouts. The union refused and the parties bargained to impasse over the proposal. The court found

that the employer had committed an unfair labor practice: the proposal was held to be a permissive subject because it involved direct dealing. "By allowing the Employer to bargain directly with its employees, Toledo Blade's proposal would deprive the Union *pro tanto* of its central statutory role." *Id.* at 1223.

Direct dealing between the employer and its employees cuts to the heart of collective bargaining and substantially weakens the union's role as collective representative of the workers. "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes,* 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 (1967). "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages," the Court wrote in *J.I. Case Co. v. NLRB,* 321 U.S. 332, 338, 64 S.Ct. 576, 580, 88 L.Ed. 762 (1944).

> [Individual contracts] are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.

Id. at 338-39, 64 S.Ct. at 580-81; *see also Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 684, 64 S.Ct. 830, 833, 88 L.Ed. 1007 (1944) ("Bargaining carried on by the employer directly with the employees, whether a minority or majority, . . . would be subversive of the mode of collective bargaining which the statute has ordained.").

Evading the union's representative role—the second *Borg-Warner* concern—is illustrated by the courts' recurring attempts to distinguish between proposals "concern[ing] a change in work jurisdiction or a change in the scope of the bargaining unit." *Local 666, Int'l Alliance of Theatrical Stage Employees v. NLRB, 904* F.2d 47, 48 (D.C.Cir.1990). In *Local 666,* the court distinguished between an employer's attempt to gain discretion over work jurisdiction—the description of tasks performed by unit members, a mandatory subject— and an attempt to gain discretion over the definition of the bargaining unit—a permissive subject because it affected which employees the union would represent. *Id.* at 50-52; *see also Idaho Statesman v. NLRB,* 836 F.2d 1396, 1400-01 (D.C.Cir. 1988) ("If [definition of the bargaining unit] were a mandatory subject, an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees' guaranteed right to representatives of their own choosing."); *North Bay Dev. Disabilities Serv., Inc. v. NLRB,* 905 F.2d 476, 478 (D.C.Cir.1990) (amount of agency fee was permissive subject because "the amount of an agency fee concerns primarily the relationship between the union and the nonmember employees; it is not 'an aspect of the relationship between the employer and employees' "), *cert. denied,* __ U.S. __, 111 S.Ct. 952, 112 L.Ed.2d 1041 (1991).

Thus, in light of the foregoing case law, it might be argued that the *American National Insurance* and *Borg-Warner* lines

of authority are somewhat in tension, at least with respect to the proper treatment to be accorded a merit pay proposal of the sort here in issue. Nonetheless, at least to date, there has been little confusion in the case law over the definition of merit pay as a mandatory subject of bargaining.

2. *Merit Pay is a Mandatory Subject of Bargaining*

As the parties here concede, the Board and the courts long have held that "the obligation of the employer to bargain collectively with representatives of its employees with respect to wages, hours and working conditions, includes the duty to bargain with such representatives concerning individual merit wage increases." *NLRB v. J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir.), *cert. denied*, 335 U.S. 814, 69 S.Ct. 31, 93 L.Ed. 369 (1948); *see also, e.g., Colorado-Ute*, 939 F.2d at 1400 ("It is well established that merit wages are encompassed within [the] statutory language and are a mandatory subject of bargaining."); *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C.Cir.1981) (merit pay is a mandatory subject); *NLRB v. Johnson Mfg. Co.*, 458 F.2d 453, 454-55 (5th Cir.1972); *NLRB v. United Brass Works, Inc.*, 287 F.2d 689, 697 (4th Cir.1961); *NLRB v. Berkley Mach. Works*, 189 F.2d 904, 907 (4th Cir.1951); *General Controls Co.*, 88 N.L.R.B. 1341, 1342 (1950) ("It is now beyond dispute that an employer is under a duty to bargain with the representative of its employees with respect to individual merit increases.").

Additionally, it is largely undisputed that proposals for employer discretion over merit pay are mandatory subjects. In *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284 (D.C.Cir.1991), the Board found no unfair labor practice where an employer insisted to impasse over a unilateral merit pay plan,

a no-strike clause and a restricted grievance procedure which excluded arbitration. The court affirmed, distinguishing *Toledo Blade*, where, as described above, the court had found a proposal for direct employer-employee negotiations over retirement buyouts to be a permissive subject. *Id* at 289.

> Although the [employer] certainly sought a greater role for itself, and a lesser role for the Union, with respect to employee compensation and the resolution of day-to-day disputes, the Employer did not propose to strip the Union of its collective bargaining function. The [employer] was willing to negotiate with the Guild on the content of the merit pay plan, and to let the Guild represent any employee who wanted to challenge his proposed wage increase through the grievance procedure. These concessions would have preserved the Guild's role as the collective bargaining agent of its members, which is what distinguishes this case from *Toledo Blade*.

Id. at 290; *see also Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 469-70 (3d Cir. 1983) (no bad faith bargaining for employer to insist on discretion over merit pay, posting and bidding procedures, and work jurisdiction); *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546, 547-49 (5th Cir.1973) (employer insisted to impasse on discretion over merit pay). Furthermore, where the employer makes a unilateral decision about merit pay, without bargaining with the worker, it does not " 'intrude into the relationship between the employees and their Union' [and] interfere with the employees' right to bargain collectively." *Cincinnati Newspaper Guild*, 938 F.2d at 289 (quoting *Toledo Blade*, 907 F.2d at 1223).[3]

3. In *Toledo Blade*, the court distinguished between a provision (Cont'd)

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The merit pay proposal here shares many of the same features of the *Cincinnati Newspaper Guild* proposal. Although McClatchy was not constrained in its discretion to grant or deny merit pay, it "agree[d] to consider the Guild's comments, suggestions and recommendations about the merit evaluation and appeal processes." Posted Conditions of Employment, § 5.0(c), J.A. 287. Additionally, McClatchy agreed that "[i]f the employee requests, the Guild may participate with the employee in the appeal process." *Id.* § 5.0(e), J.A. 287. McClatchy's proposal thus was a mandatory subject of bargaining, and the Board does not suggest otherwise in its decision in this case.

B. *The Duty To Bargain in Good Faith*

Because merit pay is a mandatory subject of bargaining, the parties were required to meet and in good faith try to reach an agreement. Neither side could take unilateral action with respect to the subject while bargaining continued. The employer and union were under no obligation to reach an agreement, however, and the Board was powerless to compel one.

1. *Bargaining "in Good Faith" and the Unilateral Change Doctrine*

"[P]erformance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-

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(Cont'd)
which would have allowed the employer to deal directly with individual employees over retirement benefits (held to be permissive) and the management rights proposal upheld in *American National Insurance*, noting that in the latter case "[t]he employer's subsequent decisions would be made unilaterally; they would not entail its negotiating with its employees." 907 F.2d at 1223-24.

management differences. . . . [Rather], an employer [must] 'negotiate in good faith with his employees' representative; to match their proposals, if unacceptable, with counterproposals; and to make every reasonable effort to reach an agreement.' " *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402, 72 S.Ct. 824, 828, 96 L.Ed. 1027 (1952) (quoting *Houde Eng'g Corp.*, 1 N.L.R.B. (old) 35 (1934)). In furtherance of this general goal, the Board and the courts have identified several "per se" violations of the duty to bargain, in addition to a "totality of the circumstances" approach to the duty. *See generally* Archibald Cox, *The Duty To Bargain in Good Faith*, 71 HARV.L.REV. 1401, 1421-28 (1958).

Generally, an employer commits a violation of the duty to bargain in good faith when it makes a unilateral change in a mandatory subject of bargaining during the course (or in the absence) of negotiations. Thus, where the employer granted merit pay increases during the course of negotiations, the Supreme Court held "that an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962); *see also, e.g., NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C.Cir.1982) ("[A]n employer's implementation of a pre-impasse unilateral change in established wages or working conditions, over which bargaining is required, will constitute a violation of section 8(a)(5)."). Here, the Board found that McClatchy committed an unfair labor practice by unilaterally granting merit pay increases.[4]

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4. As noted *infra*, the Board's finding in this case is not in conformity with the *Katz* line of authority; that is so because, in this case, the employer was found to have bargained in good faith to a point of impasse, and the disputed unilateral action was taken only after impasse (and not during the course of negotiations).

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A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385, 66 S.Ct. 203, 209, 90 L.Ed. 145 (1945). Professor Cox highlighted the injury to the employees' right to be represented:

> When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great as, or possibly greater than, those the union can secure.

Cox, *supra*, at 1423. The unilateral change doctrine is thus applicable whether or not there is other evidence of bad faith bargaining.

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be

> an unfair labor practice in violation of § 8(a)(5), without also finding the employer guilty of over-all subjective bad faith.

Katz, 369 U.S. at 747, 82 S.Ct. at 1114.

The unilateral change doctrine is the basis for the related "past practices doctrine." Under the past practices rule, an employer and union who are bargaining without a collective bargaining agreement in effect generally must maintain the status quo with regard to mandatory subjects of bargaining. However, where the employer has had unilateral discretion over a mandatory subject, the employer cannot continue to exercise that discretion without prior notice to the union. For example, an employer may not continue granting discretionary merit pay raises, even if the review process has become customary and itself must be continued.

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Oneita Knitting Mills, 205 N.L.R.B. 500, 500 n. 1 (1973) (citation omitted); *see also Litton Microwave Cooking Products*

v. NLRB, 949 F.2d 249, 252 (8th Cir.1991) (merit pay case following the *Oneita Knitting Mills* rule), *cert. denied*, __ U.S. __, 112 S.Ct. 1669, 118 L.Ed.2d 390 (1992); *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C.Cir.1981) (Company could not discontinue annual reviews, but also "could not unilaterally determine the size of the increase that each employee would receive; it would be required to bargain over this discretionary element."). The Court in *Katz* explained that the employer may no longer exercise discretion because "[t]here simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice." 369 U.S. at 746, 82 S.Ct. at 1113.

2. *The Limit on the Duty To Bargain: Parties are not Required To Agree*

As section 8(d) plainly states, the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1988). Congress added this language to the NLRA by the Taft-Hartley Act in "an attempt . . . to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487, 80 S.Ct. 419, 426, 4 L.Ed.2d 454 (1960). The parties' relative economic strength — and not the Board's opinion — determines the substantive terms of the employer/union agreement. In short, while the Board, through judicial enforcement, can compel the parties to bargain, neither the Board nor the courts may use their authority to determine the results of that bargaining.

The NLRA was designed only to encourage meaningful discussion between employers and employee representatives. "The basic theme of the Act was that through collective

bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.K Porter Co. v. NLRB*, 397 U.S. 99, 103, 90 S.Ct. 821, 823, 25 L.Ed.2d 146 (1970); *see also* Cox, *supra*, at 1403-18 (discussing history of the Act). Equally clearly, however, Congress did not intend for the Board to impose substantive conditions. "[I]t was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." 397 U.S. at 103-04, 90 S.Ct. at 823-24.

In *H.K. Porter Co.*, the Board found that the employer bargained in bad faith and it ordered, as relief, that the company agree to a union dues check-off proposal, which was one of the major contentions between the parties. The Supreme Court found that, even though there was no apparent good reason for the employer's rejection of the dues check-off proposal, the Board's attempted exercise of remedial authority fell outside the Board's powers under the Act.

> [T]he Act . . . does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining.

397 U.S. at 109, 90 S.Ct. at 826; *see also Insurance Agents'*, 361 U.S. at 489, 80 S.Ct. at 427 ("The presence of economic

weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.").

It is this balance between the duty to bargain and the power not to agree that caused the Court in *American National Insurance Co.* to conclude, as noted above, that proposals to retain discretion over mandatory subjects are themselves mandatory subjects. *See* 343 U.S. at 407-09, 72 S.Ct. at 831-32. This balance also means that the Board may not find a bad-faith refusal to agree solely by looking to the employer's bargaining position. "The Board now seems to have accepted the courts' repeated teaching that an employer's bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence." *Cincinnati Newspaper Guild,* 938 F.2d at 289; *cf. Sparks Nugget, Inc.,* 298 N.L.R.B. No. 69 (1990) (employer's insistence on unilateral discretion over seniority and wages was strong evidence of surface bargaining); *Viking Connectors Co.,* 297 N.L.R.B. No. 15 (1989); *Marina Assocs,* 296 N.L.R.B. No. 147, at 1 n. 1 (1989) ("We disagree with the judge's statement that bad-faith bargaining may be determined solely by an employer's 'reservation to itself of unilateral control over merit increases.' ") (quoting *Colorado-Ute Alec. Ass'n,* 295 N.L.R.B. No. 67 (1989)).

C. *The Impasse Doctrine*

Because the NLRA compels negotiation, but not agreement, the parties occasionally will reach an impasse in negotiations. Typically, when a good-faith impasse is reached, the duty to bargain further is temporarily satisfied and suspended, and either side is free to make unilateral changes in mandatory subjects

that are reasonably comprehended within their proposals at the bargaining table. A party may insist to impasse on any mandatory subject, including proposals to retain discretion over a mandatory subject. Therefore, under established labor law, McClatchy would have the right to insist to impasse on its merit pay proposal and to implement it after reaching an impasse in good faith.

This court has defined impasse as "the deadlock reached by bargaining parties 'after good-faith negotiations have exhausted the prospects of concluding an agreement.' " *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C.Cir.1986) (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C.Cir.1968)). In *Taft Broadcasting*, the Board identified the primary factors that would determine whether the parties had reached impasse.

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

163 N.L.R.B. at 478.[5]

5. See also Teamsters Local Union No. 639 v. *NLRB*, 924 F.2d 1078, 1083 (D.C.Cir.1991) ("In reviewing the Board's determination of

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A good-faith impasse in negotiations temporarily suspends the duty to bargain. The parties, however, are not permanently relieved of the duty to deal with each other. In *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982), the Supreme Court summarized the prevailing view of the effect an impasse has on the bargaining relationship.

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." [*Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1093-94 (1979).] Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." *Id.*, at 1094. Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." *Ibid.*

Id. at 412; *see also Hi-Way Billboards Inc.*, 206 N.L.R.B. 22, 23 (1973) ("When such a deadlock is reached between the parties, the duty to bargain about the subject matter of the

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impasse, we are mindful of its accumulated expertise in the area: 'in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with the such problems.' ") (quoting *Dallas Gen. Drivers Local Union No. 745 v. NLRB*, 355 F.2d 842. 844-45 (D.C.Cir.1966)); Peter G. Earle, Note. *The Impasse Doctrine*, 64 CHI.-KENT L.REV. 407 (1988) (reviewing factors considered in impasse cases).

impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible.").

As indicated above, *see* note 4 *supra*, the unilateral change doctrine generally applies only to changes made before fulfilling the duty to bargain—in other words, before the parties bargain to impasse. "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change in an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, __ U.S. __, 111 S.Ct. 2215, 2221, 115 L.Ed.2d 177 (1991); *see also, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n. 5, 108 S.Ct. 830, 833 n. 5, 98 L.Ed.2d 936 (1988) (at impasse "the employer's statutory duty to maintain the status quo during postcontract negotiations would end"); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224, 69 S.Ct. 960, 963, 93 L.Ed. 1320 (1949) (no unfair labor practice where there is "a unilateral grant of an increase in pay made by an employer after the same proposal has been made . . . in the course of collective bargaining but has been left unaccepted or even rejected") (dicta); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C.Cir.1991) ("In the absence of a bargaining impasse, an employer violates section 8(a)(5) . . . by refusing to bargain. . . . An employer also violates its bargaining obligation . . . if, without having negotiated to impasse, it unilaterally changes its employees' terms or conditions of employment.") (internal quotation omitted).

Thus, an employer may unilaterally implement its proposals upon impasse in negotiations. *"After bargaining to impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably*

comprehended within his pre-impasse proposals." American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622, 624 (D.C.Cir.1968) (emphasis added); *see also Emhart Indus. v. NLRB,* 907 F.2d 372, 377 (2d Cir.1990); *Lapham-Hickey Steel Corp. v. NLRB,* 904 F.2d 1180, 1185 (7th Cir.1990); *Southwest Forest Indus., Inc. v. NLRB,* 841 F.2d 270, 273 (9th Cir.1988); *United Steelworkers v. Fort Pitt Steel Casting Div.,* 635 F.2d 1071, 1078 (3d Cir.1980), *cert. denied,* 451 U.S. 985, 101 S.Ct. 2319, 68 L.Ed.2d 843 (1981); *Omaha Typographical Union, No. 190 v. NLRB,* 545 F.2d 1138, 1142 n. 4 (8th Cir.1976).

Although these doctrines do not conclusively hold that an employer may insist to impasse over a discretionary wage proposal, the foregoing strongly suggests that McClatchy would have the right to implement its merit pay proposal upon impasse. Merit pay is a mandatory subject of bargaining. Employers may insist to impasse over mandatory subjects, even over those proposals which would garner them discretion over mandatory subjects. "[A]n employer's adamant insistence on promanagement terms does not alone demonstrate bad faith, and . . . neither side is required to agree to a proposal or make concessions." *NLRB v. Cauthorne,* 691 F.2d 1023, 1026 n. 5 (D.C.Cir.1982) (citation omitted). The Board found, and the parties do not now dispute, that McClatchy and the Guild bargained to a good-faith impasse over the merit pay program. Finally, after impasse, an employer may implement its final proposal. Thus, as the Tenth Circuit suggested in *Colorado-Ute,* it is difficult to comprehend the Board's judgment in this case.

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III. *The Board's Limit on McClatchy's Ability To Implement its Merit Pay Program*

In its opinion, the Board suggested two possible rationales for departing from the established analytical framework and holding that McClatchy violated section 8(a)(5). Neither supports the Board's result. First, the Board suggested that the individual merit pay increases granted by McClatchy were not "encompassed" within its bargaining proposal. But it makes no sense to say that an employer does not act within a proposal that would allow it unilaterally to determine each employee's merit raise when it unilaterally grants such a raise to a single employee. Second, the Board held that McClatchy sought a de facto "waiver" of the union's right to bargain over employees' wages and, failing to secure one, unjustly acted in derogation of that right. The waiver cases, however, are clearly inapposite where, as here, no collective bargaining agreement is currently in effect, the employer makes a permissible proposal on a mandatory subject and the parties bargain to impasse over that proposal.

A. *Are Individual Wage Raises Comprehended Within a General, Discretionary Proposal?*

The Board reasoned that McClatchy's proposal gave the Union no opportunity to bargain over the mandatory subjects of timing and individual amounts of merit pay. "[McClatchy's proposal] set no criteria for the amounts or timing of merit increases, and failed to provide for union participation either in the initial determination of merit increases granted to particular employees or afterwards through the contractual grievance procedure." *McClatchy Newspapers,* 299 N.L.R.B. No. 156, at 6, J.A. 316; *see also id.* at 7, J.A. 317 ("the Respondent had a

lawful right after impasse unilaterally to consider employees for merit increases; however, as announced in *Colorado-Ute*, . . . , it still had a duty to bargain with the Union about the timing and amounts of the merit increases prior to granting any such increases").

The Board's reasoning is far from persuasive. First, as the Tenth Circuit said, "Precedent does not support the Board's position that the Union's right to bargain can be vindicated only by discussing the economic terms of particular merit increases, rather than a general proposal that the employer be permitted to exercise discretion with respect to merit wage programs." *Colorado-Ute*, 939 F.2d at 1401. The Court in *American National Insurance* said directly that whether a matter is treated by definite terms or by a "more flexible" system is a matter for bargaining and, if necessary, economic pressure. 343 U.S. at 407-09, 72 S.Ct. at 831-32.

Second, the Board cannot plausibly contend that an individual's merit raise is not comprehended within the employer's proposal to have discretion over all employees' raises. "A company that has so exhausted bargaining that it may make a unilateral change is not to be put under a universal requirement of a duty to bargain about timing or other specific aspects of a change that is within the ambit of proposals already made and rejected." *American Fed'n of Television & Radio Artists*, 395 F.2d at 629. Implementing the proposal necessarily includes granting individual wage increases. Indeed, the Board's suggestion to the contrary is patently absurd. The Board's attempted distinction—that the employer upon impasse "was free to consider employees for merit increases" but not to grant them—fails because the employer gains nothing upon impasse that it did not have before the commencement of bargaining.

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An employer commits no violation of the duty to bargain merely by "considering" changes in mandatory subjects of bargaining.

B. *The Board's "Waiver" Theory*

The Board also contends that permitting the employer to enact its merit pay proposal works a de facto "waiver" of the union's right to bargain over merit pay.

> The Union did not agree to the Respondent's merit pay proposal and, in fact, expressed its opposition to it for the very reason that it would completely exclude the Union's participation in determining merit pay increases. The Respondent was unable during negotiations to secure the Union's waiver of its right to bargain over the timing and amounts of merit pay increases. Nor does the parties' bargaining history establish a waiver. Consequently, the Respondent was free to insist to impasse that the Union agree to waive its statutory rights, but was not privileged to proceed with implementation after impasse as though it had successfully secured the Union's waiver.

299 N.L.R.B. No. 156, at 6-7, J.A. 316-17 (footnote omitted); *see also id.* at 6, J.A. 316 ("Thus [according to the Board], the proposal, by providing for unlimited management discretion over the determination of timing and amounts of merit increases, was in reality seeking the Union's waiver of its statutory right to be consulted over those matters under Section 8(a)(5) and (1) of the Act.").[6]

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6. In *Colorado-Ute*, the Board illustrated its argument with the following hypothetical:

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> Consider, as a typical example, a case where an employer proposes in negotiations for a new contract that wages should be reduced from $7 an hour to $6 an hour. The union proposes that wages be increased to $8 an hour. The parties insist on their respective positions until they reach a good-faith impasse in negotiations. Having reached a point where further bargaining would be fruitless, Section 8(a)(5) does not require the employer thereafter to pay its employees $8 an hour as the union demanded, or to abandon its proposal and leave wages at $7 an hour. The employer is free to implement its proposal and pay employees $6 an hour.
>
> In the example above, the employees have no statutory right to be paid $8.00 or $7.00 an hour rather than $6.00 an hour, thus the Act does not require that the employer obtain the union's consent before paying $6.00 an hour. The Act only requires that the employer propose the wage rate and bargain with the union in good faith before implementation. Where an employer proposal seeks the union's waiver of statutory rights, however, impasse is no substitute for consent. An employer may insist to impasse as a condition of agreement that the union agree to a no strike clause. *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948). Absent the union's agreement, however, the employer is not thereafter free to implement its proposal by firing striking employees.

295 N.L.R.B. No. 67, at 9.

The Board's argument premised on the no-strike example is a non sequitur. Under the National Labor Relations Act, employees have an absolute *statutory right* to strike, absent some contractual waiver of that right. There is no comparable statutory right to be

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Established waiver doctrine, however, is directed to a substantially different problem. In waiver cases, the employer takes some unilateral action with respect to a mandatory subject and claims that the union had already agreed to the employer's right to take that action. For example, in the leading waiver case, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983), the company disciplined union leaders who violated the collective bargaining agreement's no-strike clause more severely than "regular" employees who also had walked out. Defending against a charge of anti-union discrimination in violation of section 8(a)(3), the employer asserted that, by acquiescing in two arbitration decisions interpreting the no-skike provision of the contact, "the union in effect ha[d] waived the protection afforded by the statute." *Id.* at 705, 103 S.Ct. at 1475; *see also, e.g., NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1574-75 (2d Cir.1989) (employer initiated new disciplinary system and claimed that union had waived its right to bargain over it); *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1028-29 (D.C.Cir.1986) (employer disciplined employee for honoring picket line at a work site; employer claimed that collective bargaining agreement's no-skike clause constituted waiver of right to honor picket lines); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 469 (1976) ("The vast preponderance of cases applying the 'clear and unmistakable waiver' principle . . . involve a charge that the employer unilaterally announced or implemented a change in the status quo without giving notice or an opportunity to bargain to the

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paid pursuant to a "fixed-rate" as opposed to a "merit" pay system. The Board's no-strike example is further flawed on its own terms: although an employer may not unilaterally impose a no-strike commitment, an employer may act unilaterally to hire permanent replacements for employees who engage in economic strikes.

union. . . . The employer typically asserted as a defense that the union had authorized the employer so to act, most commonly by agreeing to a management rights clause, a zipper or integration clause, a grievance and arbitration procedure, . . . , or some unwritten concession in the course of bargaining.").

The factual circumstances of this case could not be more different. Here, McClatchy offered the Guild the opportunity to bargain over its wage plan, and the Board found that the parties negotiated in good faith to impasse over the proposal. The Newspaper does not claim that the union agreed to waive its right to negotiate over the merit pay proposal or over individual merit pay raises. Rather, the Newspaper claims that, by negotiating to impasse, it satisfied its duty to bargain and therefore could proceed with its proposal under the impasse rule.

The Board, however, asserts that the waiver cases establish that "[i]n the absence of such a waiver, the employer's obligation—as in other situations involving statutory rights—is to comply with the statute." Brief of the NLRB at 25-26. In the *Colorado-Ute* decision, the Board directly states that a bargaining impasse is "no substitute for consent"—the employer cannot take the action unless the union agrees. *See* 295 N.L.R.B. No. 67, at 8. But the Board is comparing apples and oranges. In none of the cases the Board cites did the employer attempt to bargain about the change before enacting it. *See NLRB v. Challenge-Cook Bros.*, 843 F.2d 230, 232-34 (6th Cir.1988); *Ciba-Geigy Pharms. Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir.1983); *NLRB v. Southern Calif. Edison Co.*, 646 F.2d 1352, 1364-69 (9th Cir.1981). The Board has attempted to take the words from decisions involving claims of "waiver" in situations where an agreement exists and apply them to cases where the

parties are bargaining to secure an agreement; it does not work because, in the latter situation, the impasse rule comes into play (thus making "waiver" irrelevant).

Thus, the words from some of the "waiver" cases, saying that union consent is necessary before the employer may take action, are irrelevant in cases that implicate the impasse rule. For example, where the parties have a presently effective, integrated collective bargaining agreement that includes a "zipper" clause, the parties may take only those actions specifically detailed in the collective bargaining agreement. "During the term of a contract . . . the scope of the duty to bargain over a particular mandatory subject depends upon whether that subject is 'contained in' the contract." *International Union, UAW v. NLRB*, 765 F.2d 175, 179 (D.C.Cir.1985) ("*Milwaukee Spring*"). Where the contract is zippered, it necessarily covers all the mandatory subjects of bargaining and the employer is forbidden to take any action not "contained in" the contract without the union's consent. By the interaction of the zipper clause and section 8(d)'s prohibition on midterm changes in subjects agreed upon, neither party can take any action not contained in the contract and neither parts can force the other side to bargain over any subject not contained in the contract. Thus, *consent*, not bargaining to impasse, is required to affect a mandatory subject. The *Milwaukee Spring* court explicitly laid out this result.

> Thus, it is well understood that section 8(d) prohibits an employer from altering contractual terms concerning mandators subjects of bargaining during the life of a collective bargaining agreement with out the consent of the union.

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> A mandatory subject of bargaining may be brought into the "contained in" category, and therefore within the provisions of section 8(d), either through explicit reference, such as a wage provision, or through a general waiver of the duty to bargain, such as a zipper clause Generally speaking, a zipper clause has the effect of incorporating all possible topics of bargaining—both those actually discussed and those neither discussed nor contemplated during bargaining—into the contract. As a result, with the inclusion of a zipper clause, section 8(d)'s "contained in" requirements are brought into play with regard to all mandatory subjects of bargaining; neither party may require the other to bargain over any mandatory subject, nor unilaterally implement a change in the status quo concerning a mandatory subject, even after bargaining to impasse.

Id. at 180 (footnotes omitted). Thus, consent is necessary only because section 8(d) prevents any nonconsensual changes in mandatory subjects "contained in" the contract and the zipper clause integrates all mandatory subjects into the contract.

Similarly, in "waiver" cases where the statutory right involves a specific protected union activity, consent will be necessary. For example, in *Local Union 1395, IBEW v. NLRB,* 797 F.2d 1027 (D.C.Cir.1986), the employer, a power company, disciplined an employee who honored a picket line at a work site. "Under Section 7 of the Act, 29 U.S.C. § 157 (1982), employees enjoy the right to observe lawful picket lines that they encounter in the course of their duties." *Id* at 1029. The company argued, and the Board found, that the union had waived its rights by agreeing to a broad, general no-strike clause.

The court disagreed and held that company could not institute the discipline without the union's consent—bargaining to impasse would not suffice.

> In the proceeding below, Local 1395 introduced evidence that when the contract was negotiated the parties had asserted different interpretations of the no-strike clause and that neither party had acquiesced in the other's view. The ALJ concluded that the parties had agreed to disagree over whether sympathy strikes were covered by the clause. If accepted, this factual finding would be controlling: absent mutual consent on the issue, there could be no binding contractual commitment, and, *a fortiori,* no clear and unmistakable waiver of the right to honor picket lines.

Id at 1036 (citation omitted). This result is explained by the shape of the right at issue. Section 7 protects workers' right to respect lawful picket lines and the employer may not violate that right without a waiver. Section 8(a)(5), by contrast, protects only the workers' right to have the employer *bargain* with the union over wages. As the Court held in *American National Insurance Co.*, the section does not give the workers the right to have a definite, standard-based wage system as opposed to a discretionary employer-conducted system. Rather, the workers must bargain for that right, including using their economic weapons. Thus, as noted above, once the employer has bargained to impasse over its proposal, it has satisfied the statute.

In sum, the waiver rationale fails. McClatchy satisfied its duty to bargain over the wage system for unit employees and the union has no right to insist upon a proposal for definite

terms. Thus, from the perspective of general impasse doctrine, the Board's reasoning fails. The merit pay proposal was a subject over which the employer could insist to impasse; and employers generally may unilaterally implement those proposals offered and rejected.

IV. *Alternate Paths to the Board's Result?*

Although we believe it has failed adequately to justify its result in this case, the Board considers the issues in this case to be fundamental. I cannot disagree. However, "[b]ecause the Board misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without adequate rationale . . . [thus,] we remand this case . . . so that the Board may reconsider" its decision. *Prill v. NLRB,* 755 F.2d 941, 942 (D.C.Cir.), *cert. denied,* 474 U.S. 948, 1 06 S.Ct. 3 1 3, 88 L. Ed. 2d 294 (1985). Nonetheless, I review some of the implications of the above discussion for the light it may throw on the Board's future attempts in this area.

A. Merit Pay Proposals as Permissive Subjects

In his decision, the ALJ expressed concern that McClatchy's proposal constituted impermissible direct dealing. *ALJ Decision* at 8, J.A. 330. As noted previously, the specter of direct dealing between employers and employees often prompts the Board to declare a particular proposal a permissive subject. *See* section II.A.1 *supra.* Employers may offer these proposals, but may not insist on them to impasse. Although the Board in this case did not rely on this rationale, certain aspects of the Newspaper's proposal arguably suggest direct dealing and, therefore, the proposal might be permissive.

Of course, it is settled law of the circuit that discretionary merit pay proposals are not *per se* permissive subjects. *See* section II.A.2 *supra.* Nonetheless, McClatchy's final proposal also permitted employees to deal directly with the newspaper. *See* Posted Conditions of Employment, § 3.9, J.A. 286 ("Nothing in this Agreement shall prevent employees from bargaining individually for salary increases in excess of the minimums established herein."). Additionally, the Union here can represent an employee in his appeal of a merit pay raise only if the employee requests. *Id.* § 5.0(e), J.A. 287. Direct dealing with the employee requires the union's consent; as the Court held in *J.I. Case,* all employees are bound by the majority's decision to bargain collectively. 321 U.S. at 339, 64 S.Ct. at 581.[7]

Whether or not these aspects of McClatchy's proposal create direct dealing in fact would be a matter for the Board in the first instance.[8] But, were the Board to find a given merit pay

7. In *Cincinnati Newspaper Guild,* where the court found no direct dealing, it appears the union had the *right* to represent the employees in all appeals. *See* 938 F.2d at 290; *see also Colorado-Ute,* 939 F.2d at 1397-98 n. 3 (noting that employee discussions with company president regarding their individual merit raises might constitute "negotiations," but finding no individual discussions in that case).

8. The Board, at this point, may not be able to rely on this theory here, if the Guild waived it or the General Counsel failed to argue it. In this court, the Guild did not advance it, relying instead as it must on the Board's erroneous waiver theory. *See* Brief for Intervenor, Northern California Newspaper Guild, Local 52, at 15 n. 6 *("Toledo Blade* held that for all these rea sons, a proposal for direct dealing between an employer and employees is not a mandatory subject of bargaining at all. For purposes or this case, the union is not so contending, but is maintaining, instead, that at the very least the (Cont'd)

proposal to implicate direct dealing to the extent necessary to make it a permissive subject, then the employer would not be free to insist on it to impasse. Of course, the Board must, in the first instance, consider this and related questions, *see* note 8 *supra,* on remand.

B. Merit Pay as a "Different" Issue

At oral argument, counsel for the Board suggested that merit pay was unique in some way that justified the Board's result in this case. While the notion that "wages" may be the heart of all the terms of employment has intuitive appeal, I confess that I am not certain of the scope of this potential argument. Still, the Board is the primary force for balancing the sometimes conflicting policies behind the NLRA. The Board, in exercise of its charge to further the collective bargaining process, may be able to demonstrate that unilateral employer discretion over wages uniquely injures peaceful bargaining and labor relations.

C. Modification of the Impasse Rule

Finally, the Board may wish to consider fashioning a limited exception to the impasse rule. In effect, the Board might create a new category of bargaining subjects which would include those proposals by which the employer seeks to grab discretion. Consistent with *American National Insurance Co.*, the employer could go to impasse over these proposals—denying the union a contract unless it acquiesced—but the employer could not

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direct dealing aspects of the merit pay program here underscore that that proposal involves a substantial waiver of statutory rights.") (citation omitted).

implement specific examples of the proposal (for example, grant individual merit pay raises) without further notice to the union.

The right to implement upon impasse (*i.e.*, the impasse rule) is not a right guaranteed by statute, but rather grows out of the particular scheme of industrial relations created by the National Labor Relations Act. As described previously, the Act encourages collective bargaining while preserving most of the economic weapons each side has to force the other to agree. The unilateral change rule recognized in *Katz*, from which the impasse rule derives, protects the employees' collective bargaining right while simultaneously reserving to employers the right to manage their enterprises so long as they bargain in good faith with the employees' representative.

Nonetheless, although the impasse rule in general balances these competing impulses, it need not apply to every category of cases. For example, in *Charles D. Bonanno Linen Service*, the Court upheld the Board's determination that an impasse in negotiations would not justify a single employer's withdrawal from a multiemployer bargaining unit, even if that employer were the target of a whip-saw strike by the union. The Court deferred to the Board's view that permitting withdrawal, absent extraordinary circumstances, would damage the process of multiemployer collective bargaining.

> Of course, the ground rules for multiemployer bargaining have not come into being overnight. They have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the "conflicting legitimate interests" in pursuit of the "national policy of promoting labor peace through strengthened

> collective bargaining." [*NLRB v. Truck Drivers*, 353 U.S. 87, 95, 96, 77 S.Ct. 643, 647, 1 L.Ed.2d 676 (1957) *(Buffalo Linen).*] The Board might have struck a different balance from the one it has, and it may be that some or all of us would prefer that it had done so. But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that *Buffalo Linen* ruled should be left to the Board.

454 U.S. at 413, 102 S.Ct. at 413.

Similarly, in its recent decision in *Litton Financial Printing Div. v. NLRB*, __ U.S. __, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), the Supreme Court deferred to the Board's determination that arbitration provisions did not survive the expiration of a collective bargaining agreement and, therefore, they cannot be imposed unilaterally even after the parties have bargained in good faith to impasse. Thus, arbitration, as well as union security and dues checkoff provisions, can be implemented only by mutual consent of the parties to a bargaining relationship.

> The Board has identified some terms and conditions of employment . . . which do not survive expiration of an agreement for the purposes of this statutory policy. For instance, it is the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective bargaining agreement. Also, in recognition of the statutory right to strike, no-strike clauses are

> excluded from the unilateral change doctrine, except to the extent other dispute resolution methods survive expiration of the agreement.

Id. 111 S.Ct. at 2221-22 (citations omitted). In upholding the Board's extension of this exception to arbitration provisions, the Court again deferred to the Board's expertise. "The unilateral change doctrine, and the exclusion of arbitration from the scope of that doctrine, represent the Board's interpretation of the NLRA requirement that parties bargain in good faith. And '[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts.' " *Id.* (quoting *Fall River Dyeing and Finishing Corp. v. NLRB,* 482 U.S. 27, 42, 107 S.Ct. 2225-2235, 96 L.Ed.2d 22 (1987)).

Of course, neither *Bonanno* nor *Litton* directly determines the issue in this case. McClatchy was not involved in multiemployer bargaining as in *Bonanno,* and the *Litton* exceptions do not provide a rule which can be stretched to this case. As the Court in *Litton* noted, union security is, by statute, a matter of consent. *See* 29 U.S.C. § 158(a)(3) (1988) (employer may not discriminate against union nonmembers unless there is an agreement with the union); 29 U.S.C. § 186(c)(4) (1988) (dues check-off does not survive expiration of collective bargaining agreement); 111 S.Ct. at 2221-22. Similarly, the right to strike is protected by statute. 29 U.S.C. § 157 (1988). Here, neither the Newspaper nor the employees have any statutorily guaranteed right to a particular compensation system. The arbitration exception recognized in *Litton* was founded on the consensual nature of arbitration. The Act, as noted, assumes that economic power will determine the outcome of negotiations between the parties. By contrast, " 'arbitration is, at bottom, a consensual surrender of the economic power which the parties

are otherwise free to utilize.' . . . '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Litton*, 111 S.Ct. at 2222 (quoting *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 242 (1970); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960)).

Although these exceptions are not dispositive, *Bonanno* and *Litton* combine to establish three powerful points. First, the Board's attempted analogy to no-strike clauses in its *Colorado-Ute* decision will not hold water. *See* note 6 *supra*. As the *Litton* Court noted, the right to strike is protected by statute, whereas the employer merely has a duty to *bargain* over the wage structure; the NLRA includes no rights to a defined wage structure. As stated above, a proposal for unconstrained discretion necessarily includes all specific merit pay increases. This logical truth exposes the fallacy of the Board's attempt to compare the merit pay proposal to a no-strike clause.

Second, although the result reached by the Board in this case finds no adequate justification in the Board's decision, this is not to say that the result cannot be justified. *Litton* itself suggests that the impasse doctrine is not without exceptions.[9]

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9. Although the Seventh Circuit may be right that *Litton* does not settle the issue whether a union may compel an employer to arbitrate a dispute arising under a proposal the employer unilaterally implemented following impasse, where the final proposal contains an arbitration provision *see Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1510-11 (7th Cir.1991), *Litton* surely means that an implementing employer could not compel a union to arbitrate by including such a provision in its final offer. (Cont'd)

Thus, the Board may be able to find an exception to deal with the present situation.

Third, and most importantly, *Bonanno* and *Litton* reiterate the primacy of the Board in resolving the conflicting policies of the NLRA. As noted above, the employer's right to implement a proposal upon impasse grows directly out of the tension between the duty to bargain and the Act's assumption that economic strength may determine the terms of the parties' agreement. Surely it is within the Board's competence to determine in the first instance whether implementing a proposal for unilateral discretion with respect to certain subjects weighs too heavily against the collective bargaining value in the Act.

Although a unilateral, discretionary merit pay scheme does not constitute impermissible "direct dealing" per se, thereby making it a permissive subject of bargaining, such a system may pose a substantial threat to the union's role as the employees' representative. Thus, the Court in *May Department Stores Co.* considered unilateral action on wages to be the equivalent of direct dealing. "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities." 326 U.S. at 384, 66 S.Ct. at 208. If, after bargaining to impasse over the discretionary proposal, the employer can make unconstrained wage

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Litton holds that arbitration is a matter of consent, and, while an employer who implements a final proposal containing arbitration might be said to consent to it, the union over whose objection the proposal is implemented cannot be said to have given its consent.

adjustments, the futility of union representation may be driven home to each employee in much the same way the unilateral change doctrine seeks to avoid. Admittedly, the unilateral change doctrine generally presumes that implementing changes post-impasse does not hurt collective bargaining.[10] But if the employer can indefinitely adjust employee wages pursuant to the implemented proposal, impasse will no longer be the "temporary" phenomenon described in *Bonanno*. Impasses generally will be broken by the application of economic pressure by one side or by changing conditions which alter the economic calculus of one of the sides. *See Bonanno Linen Serv.*, 454 U.S. at 412 102 S.Ct. at 725; *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir.1983); 1 CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 638 (2d ed. 1983) ("In fact, a legal impasse may end suddenly; almost any changed condition or circumstance will terminate the suspension of the duty to bargain."). Where the employer has the unconstrained authority to adjust wages to respond to changing conditions, it will have substantially smaller incentives to restart collective bargaining.

Additionally, when the employer grants individualized merit pay increases, it disturbs the "collectivized" nature of collective bargaining over wages. *See J.I. Case* Co., 321 U.S. at 339, 64 S.Ct. at 581 (direct dealing impermissible where majority

10. *See NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-25, 69 S.Ct. 960, 963-64. 93 L.Ed. 1320 (1949) ("We do not here have a unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining but has been left unaccepted or even rejected in those negotiations. Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations.").

"collectivizes" employment relationship). When the employer presses to impasse a demand for discretion on individual merit payments, it takes a position which pits it against the employees as a group. But when the employer goes the next step and grants merit pay increases to selected individuals, it necessarily divides the employees and "de-collectivizes" the employees' bargaining position with respect to wages. The employees' group decision to utilize each individual's "merit" as a group asset has been nullified. This is very nearly direct dealing. "The fundamental inquiry in a direct dealing case is whether the employer has chosen 'to deal with the Union through the employees, rather than with the employees through the Union.' " *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir.1986) (quoting *NLRB v. General Elec. Co.*, 418 F.2d 736, 759 (2d Cir.1969), *cert. denied*, 397 U.S. 965, 90 S.Ct. 995, 25 L.Ed.2d 257 (1970)); *see also Facet Enters. v. NLRB*, 907 F.2d 963, 969 (10th Cir.1990) (same); *cf. Inland Tugs v. NLRB*, 918 F.2d 1299, 1310 (7th Cir.1990) ("the existence of impasse does not permit an employer to cease recognizing the union as the employees' exclusive representative"); *NLRB v. Flex Plastics, Inc.*, 726 F.2d 272, 275 (6th Cir.1984) (same).

The Board must consider whether any of the foregoing or other factors warrant an exception to the impasse rule for discretionary merit pay. McClatchy argues that the Board may not deny it the ability to grant individual wage increases because to do so would deny it an economic weapon in violation of the *Insurance Agents'* line of cases. *See Colorado-Ute*, 939 F.2d at 1404 ("[T]he employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse. Consistent with the Act, this right exists irrespective of the parties' bargaining positions. To hold otherwise would conflict with the well-established proposition that the NLRB

cannot exert its power to dictate the substantive terms of the collective bargaining agreement.") (citations omitted). The right to implement upon impasse, however, does not appear to be an economic weapon akin to a lock-out, which puts all union members in a worse economic position. And even if granting individual wage increases is an "economic weapon," denying the employer the right to implement upon impasse does not mean that the contract necessarily must include definite wage terms. The Board would not exceed its authority as in *H.K. Porter* by literally writing the terms. The Board, so long as it acts to further the statutory goals, does not exceed its authority by withdrawing a weapon from the employer. *See Bonanno Linen Serv.*, 454 U.S. at 419, 102 S.Ct. at 728 ("[T]he Board in this case has developed a rule which, although it may deny an employer a particular economic weapon, does so in the interest of the proper and pre-eminent goal, maintaining the stability of the multiemployer unit.").

If the Board persists on its present course, the most difficult problem that it will face will be to distinguish merit pay from numerous other economic proposals with respect to which an employer may take unilateral action following impasse. At least two members of this panel have some real doubts whether this can be done.[11] In any event, the Board will have an opportunity

11. Judge Silberman's separate opinion seems to suggest that, in order to reach its preferred result in this case, the Board could limit the definition of "wages" under section 8(d) to cover only *specific (i.e.*, nondiscretionary) wage proposals. As I understand it, under Judge Silberman's approach, an employer would not satisfy the duty to bargain over "wages" absent good faith negotiations over a definite (or standard based) wage proposal. The problem with this proposal is that it is clearly foreclosed by *NLRB v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952). (Cont'd)

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The Supreme Court in *American National Insurance Co.* held that the obligation to bargain over wages does not require an employer to offer a standard-based proposal. On this point, the Court said,

> [i]gnoring the nature of the Union's demand in this case, the Board takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment. . . . Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. . . . Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for management functions clauses covering any "condition of employment" as *per se* violations of the Act.

343 U.S. at 408-09, 72 S.Ct. at 831-32.

For the past forty years, the labor law jurisprudence of this country has been absolutely clear in indicating that the NLRA does not require an employer to offer to the union (or to an individual employee through the union) definite wage terms. *See also Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 289 (D.C.Cir.1991) (Board cannot find that employer bargained in bad faith over "wages" when it insists on merit pay system.). Indeed, this has been an inviolate principle under the Act, so I cannot imagine how the Board could write it out of existence pursuant to *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), as Judge Silberman's separate opinion

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to test its thinking—which thus far has been quite lacking—when this case is reconsidered on remand.

SILBERMAN, Circuit Judge:

When an employer and a union, after bargaining in good faith, reach an impasse in their negotiations, the employer is generally entitled to implement unilaterally its final proposals on mandatory subjects of bargaining. *See NLRB v. Katz*, 369 U.S. 736, 745 & n. 12, 82 S.Ct. 1107, 1113 & n. 12, 8 L.Ed.2d 230 (1962); *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C.Cir.1986); *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C.Cir.1968) (*AFTRA*). That is so, the Board explains, because "the employer's duty to bargain over proposed changes does not imply a duty to agree to the union's counterproposals or to make a concession" and "does not give the union a right to

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appears to propose. Thus, unless Congress revises the Act, or the Supreme Court overturns the judgment in *American National Insurance Co.*, I do not see how the Board can reach the position espoused by Judge Silberman.

In my view, given that, based on *American National Insurance Co.*, the employer has the right not to agree to a standard-based scheme for employee wages, the question becomes what action the employer can take after fulfilling the duty to bargain and exercising the right not to agree. In general, the impasse-doctrine suggests that the employer is free to act—the NLRA no longer acts as a constraint. Nonetheless, as I have suggested, the concern over "direct dealing" still limits an employer and this may provide a theoretical base upon which the Board could rest to develop restrictions on unilateral action taken after impasse.

veto the proposed changes by withholding consent." *Colorado-Ute Elec. Ass'n*, 295 N.L.R.B. No. 67 (1989) (citing section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d)), *enf. denied*, 939 F.2d 1392 (10th Cir.1991), *petition for cert. filed*, 60 U.S.L.W. 3582 (U.S. Feb. 25, 1992) (No. 91-1284).

In the typical case of post-impasse implementation, the employer institutes a set of wage scales and other fixed conditions of employment that it had previously offered to the union. *See, e.g., NLRB v. Pinkston-Hollar Constr. Servs., Inc.*, 954 F.2d 306 (5th Cir.1992) (specific modifications to employee benefit plans); *Emhart Indus. v. NLRB*, 907 F.2d 372 (2d Cir.1990) (seniority system); *Saunders House v. NLRB*, 719 F.2d 683 (3rd Cir.1983) (fixed percentage wage increase), *cert. denied*, 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 554 (1984); *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615 (6th Cir.1982) (changes in work jurisdiction). In other words, the employer's "implementation" of his proposal implies a willingness to define the terms of employment—at least for some period of time. In the case at bar (and in *Colorado-Ute*), by contrast, the employer's "proposal"—insofar as it relates to the pay of employees—sets forth no real terms at all; the employer asserts virtually complete and ongoing discretion to pay employees whatever the employer wishes.[1] This demand for almost unlimited

1. In this case, McClatchy's final offer proposed that all salary increases would be the result of discretionary merit reviews of individual employee performance. Although the proposal bore a surface similarity to traditional merit pay plans, which permit the employer to grant merit increases on top of normal wage scales, *see e.g., Katz*, 369 U.S. at 745-46, 82 S.Ct. at 1112-13, in reality it was quite different: it proposed to use as a salary floor the minimum salaries established in the several-year-old, expired contract. Because of inflation and because ninety percent of McClatchy's employees were already receiving the maximum salaries under the expired contract, these floors were of no real significance.

management discretion over wages is apparently a new technique of collective bargaining, *cf. NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 398, 72 S.Ct. 824, 826, 96 L.Ed. 1027 (1952) (involving proposal for broad management discretion over hiring, discipline, and work schedules), and it is certainly understandable that the union in this case claimed that the company's proposal would turn the union into a "phantom organization."

The Board, to be sure, did not hold that the newspaper's proposal was bad faith or "surface bargaining," *see, e.g., Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 288-89 (D.C.Cir.1991), or that the merit pay proposal was not a mandatory subject of bargaining. *See, e.g., Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222-24 (D.C.Cir.1990) (*Toledo Blade*). The Board must, after all, keep in mind that it is not authorized to "sit in judgment upon the substantive terms of collective bargaining agreements." *American Nat'l Ins. Co.*, 343 U.S. at 404, 72 S.Ct. at 829. Instead, the Board relied on a new approach it had devised in *Colorado-Ute* to deal with this emerging technique of employer bargaining—an approach which seems to me to have a certain symmetrical elegance. This approach starts from the Board's implicit view that if an employer and union chose not to have a collective bargaining contract, and the employer had no wage classifications, the employer would have to bargain with the union concerning every change in an individual employee's wages. If the employer, after a bargaining impasse, insists on "implementing" a merit pay proposal which sets no actual norm, but instead gives the employer discretion to pay employees what it wishes, the situation is in essence the same, and the Board will accordingly require the employer to bargain with the union each time it wants to change anyone's pay. *See McClatchy*

Newspapers, 299 N.L.R.B. No. 156, slip op. at 7 (1990). The greater the discretion embodied in the employer's proposal, the more likely, it would appear, the union will have a right to bargain over the specifics of its implementation. The Board reasons that if the employer's proposal gives no real guidance as to who will be paid how much under what circumstances, the union has a statutory right under section 8(a)(5) and 8(d) to bargain over the crystallization of these unknowns.[2] In the Board's view, granting individual wage increases without first bargaining with the union derogates from the statutory right to bargain and may be regarded as a form of impermissible direct dealing between the employer and individual employees. *Cf. Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684-85, 64 S.Ct. 830, 833-34, 88 L.Ed. 1007 (1944).

Of course, if the union had agreed to this proposal—as unlikely as that might be—the employer would be entitled to

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2. It is true, as Judge Edwards notes, *see* Opinion of Judge Edwards at 1166-67, that we have previously stated that an employer who has bars gained to impasse may make a unilateral change without being under "a duty to bargain about timing or other specific aspects of a change that is within the ambit of proposals already made and rejected." AFTRA, 395 F.2d at 629. But this proposition loses its meaning when a proposal has no identifiable "ambit." AFTRA involved fairly specific proposals for changes in work assignment procedures and prerecording policies, which left the employer free to act in only a narrow sphere of its operations. At some point, a proposal seeking discretion becomes so amorphous that almost nothing the employer does after impasse can be challenged, because the Board will be unable to determine whether or not any specific action falls outside the proposal. Deciding how sharply focused and finely tuned the lines must be in various areas of bargaining before a proposal may be implemented unilaterally after impasse is a tricky, policy-laden business, but, as I explain below, it is a business the Act may well empower the Board to get into.

the virtually unlimited discretion that it seeks. Even if the union resists, it is doubtful an employer's insistence on the clause could be thought illegal. *American National Insurance* holds that an employer's demand for discretion over a particular subject of bargaining does not make that proposal *per se* unlawful. *See American Nat'l Ins. Co.*, 343 U.S. at 408-09, 72 S.Ct. at 831-32. On the other hand, it is not clear to me (and probably not to the Board either) that an employer's demand for unlimited discretion over *all* terms and conditions of employment would be statutorily protected. By analyzing this case as one of waiver, the Board has sought to avoid drawing a line between a legally permissible and impermissible amount of discretion.[3] It might be thought that the concept of waiver is analytically distinct from the question whether a dispute is covered by a contract. *See Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C.Cir.1992). Still, in a sense all collective bargaining agreements "waive" or freeze (or channel into contract administration) the parties' bargaining rights covered by the agreement during the term of the agreement. *See Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 64041 (D.C.Cir.1991); *Local Union No. 1395, Int'l Bhd of Elec. Workers v. NLRB*, 797 F.2d 1027, 1031-32 (D.C.Cir.1986). In a case like this, however, "waiver" carries a more orthodox meaning, because, were the union to agree to the company's proposal, it would accept a vastly diminished role. *Cf. Toledo Blade*, 907 F.2d at 1222 (an employer who wishes to deal directly with its employees may do so only "if it first obtains the consent of their union.").

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3. Determining when an employer's proposal retains so much discretion that a post-impasse "implementation" is so indefinite that further bargaining at the point of specific application is required also involves line drawing. But there is presumably less tension inherent in that analytic process than there would be if the question were whether or not a proposal is entirely illegal.

Appendix D

The Tenth Circuit, reviewing the Board's new theory, rejected it. In *Colorado-Ute Electric Association v. NLRB*, 939 F.2d 1392 (10th Cir.1991), *petition for cert. filed*, 60 U.S.L.W. 3582 (U.S. Feb. 25, 1992) (No. 91-1284), the Tenth Circuit held that the Board's policy was inconsistent with the NLRA, because the Act "contemplates the legality of broad management-rights clauses and the protection of the right to bargain [only] through the application of good-faith bargaining standards." *Id.* at 1405. Judge Edwards, although he disagrees with the Tenth Circuit that the Board's result is legally unsupportable, is similarly skeptical of what he calls the Board's "waiver rationale." Opinion of Judge Edwards at 1169. He says that "[e]stablished waiver doctrine," *id.* at 1167, is inapposite to the problem of post-impasse implementation of management discretion clauses. This may be so, but it is not decisive. The real question is whether the Board has authority to fashion its *new* and somewhat different waiver rationale to address this problem.

In my view, the answer is not obvious. The language of the National Labor Relations Act—particularly sections 8(a)(5) and 8(d) setting forth the employer's obligation to bargain collectively—may well be sufficiently general to permit the Board to ground an acceptable rationale on the statute's terms. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Certainly the Act is entirely silent on the question of an employer's right to implement proposals unilaterally after impasse, which is the only concept the Board's new theory would alter. Apart from *Colorado-Ute* itself, I am aware of no case holding that the Act requires that an employer be allowed to implement unilaterally after impasse a proposal giving it substantial discretion over

the pay of individual employees.[4] And on several occasions, the Supreme Court has been willing to uphold curtailments of employer discretion that are designed to presence the integrity of the collective bargaining relationship or the union's statutory right to engage in concerted activity. *See Charles D. Bonanno Linen Serv. v. NLRB,* 454 U.S. 404, 412, 418-19, 102 S.Ct. 720, 725, 728-29, 70 L.Ed.2d 656 (1982); *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 233-35, 83 S.Ct. 1139 1148-49, 10 L.Ed.2d 308 (1963); *cf. NLRB v. Blevins Popcorn Co.,* 659 F.2d 1173, 1189 (D.C.Cir. 1981) (holding that an employer cannot grant discretionary pay increases prior to impasse without bargaining with the union over their size); *NLRB v. John Zink Co.,* 551 F.24 799, 802 (10th Cir.1977) (same).

Although the Supreme Court has held that conventional merit pay proposals are mandatory subjects of bargaining, *see Katz,* 369 U.S. at 745, 82 S.Ct. at 1112, and suggested that they would not derogate from the rights of the union solely because of the management discretion they entail, *see American Nat'l Ins. Co.,* 343 U.S. at 408-09, 72 S.Ct. at 831-32, the Court has never focused on the implementation of merit pay plans after impasse—let alone a plan such as this one. Indeed, in *Litton Financial Printing Division v. NLRB,* __ U.S. __, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), the Court recognized that certain types of proposals—in *Litton* it was an arbitration clause—are contract-dependent and may not be imposed absent consent. *See id.* at 2222. This necessarily means that such provisions are outside not only the ban on pre-impasse unilateral changes at issue in *Litton,* but also the privilege of unilateral implementation *after* impasse.

4. *American National Insurance,* which dealt with a classic management rights clause rather than what might be thought the more sensitive issue of wages, does not even address the problem of "implementing" a discretionary provision post-impasse.

Appendix D

As we have observed, other contract-dependent provisions, such as union-shop, dues-checkoff, and no-strike provisions, all either involve a "statutorily guaranteed right" or are "statutorily dependent upon an existing collective bargaining agreement." *Southwestern Steel & Supply Inc. v. NLRB,* 806 F.2d 1111, 1114 (D.C.Cir. 1986). It seems to me that a good argument can be made that discretionary merit pay plans of the sort we have here undermine the statutory right of a union to bargain collectively over wages, and thus fall within the rationale of cases like *Litton.*[5] Even *Katz,* which held that an employer could not grant discretionary merit pay increases to selected employees during negotiations for an initial contract, does not rule out the argument that discretionary merit pay schemes are contract-dependent.

The real problem in this case is that the Board has not adequately explained its position. In its order, the Board did not discuss *Litton, Katz,* or *Southwestern.* It made no effort to reconcile its novel theory that certain proposals involving mandatory subjects of bargaining may not be implemented after impasse with the arguably contrary strains in the law that led the Tenth Circuit to disapprove the theory in *Colorado-Ute.* It gave no indication of the way in which its policy would work in practice or what types of management discretion would be included within the policy's boundaries. We have no way of knowing, for example, whether employers would be barred from implementing after impasse all clauses reserving some discretion to management, including those pertaining to non-

5. There are also potential problems with this reasoning, depending upon the precise nature of the Board's theory. If, for example, the Board concludes (as perhaps it must) that an employer may implement unilaterally an individual merit pay increase after bargaining to impasse with the union over it, then merit pay would not be contract-dependent in the strict *Litton* sense.

wage terms of employment or traditional management rights, or whether the Board's policy would instead be limited to contract terms that are deemed to be in some sense at the core of the collective bargaining right. Nor did the Board satisfy its obligation to address its own contrary precedents approving unilateral post-impasse implementation of merit pay plans, so that the court and the public could be certain that the Board charted its new course deliberately. *See, e.g., Hyatt Hotels Corp.*, 296 N.L.R.B. No. 37 (1989), *enf'd on other grounds*, 939 F.2d 361 (6th Cir.1991); *Presto Casting Co.*, 262 N.L.R.B. 346, 354-55 (1982), *enf'd in part and enf. denied in part on other grounds*, 708 F.2d 495 (9th Cir.), *cert. denied*, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983).

Instead, the Board's order said only that McClatchy's merit pay proposal, "by providing for unlimited management discretion over the determination of timing and amounts of merit increases, was in reality seeking the Union's waiver of its statutory right to be consulted over those matters" and concluded, relying on its prior determination in *Colorado-Ute*, that unilateral implementation was impermissible, because McClatchy "still had a duty to bargain with the Union about the timing and amounts of the merit increases prior to granting any such increases." *McClatchy Newspapers, Inc.*, 299 N.L.R.B. No. 156, slip op. at 6, 7 (1990). This explanation is inadequate to support such a major change in the law, especially one that is in some tension with other important doctrines. The Board's policy, in order to be entitled to judicial deference, must be explained and justified further. Accordingly, I agree that this case is appropriately remanded to the NLRB for further consideration.

Appendix D

KAREN LeCRAFT HENDERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Silberman's characterization of the Board's rationale as "inadequate to support such a major change in the law," Silberman Opinion at 1178, and even more with Judge Edwards' determination that the Board's order "rests on a completely inadequate theory and fails to recognize the settled legal doctrines which bound this case," Edwards Opinion at 1154. I therefore join my colleagues in denying the petition for enforcement. Nevertheless I dissent from their decision to remand. In my view, it follows ineluctably from the "settled legal doctrines" Judge Edwards invokes that the Board's merit pay decision "infringes on the employer's right to bargain for and implement an admittedly lawful wage proposal." *Colorado-Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1405 (10th Cir.1991). Accordingly, I would simply deny enforcement of the Board's order.

It is beyond dispute that an employer commits an unfair labor practice if it unilaterally changes a mandatory subject of bargaining without first bargaining to impasse. *Litton Fin. Printing Div. v. NLRB*, __ U.S. __, 111 S.Ct. 2215, 2221, 115 L.Ed.2d 177 (1991). It is equally settled, however, that if the employer first bargains in good faith to impasse it may proceed to implement its proposed change, notwithstanding the union's ultimate failure to consent. *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 642 (D.C.Cir.1991). That is exactly what occurred here. McClatchy proposed to institute a discretionary merit raise system, a proposal subject to mandatory bargaining. *See NLRB v. Katz*, 369 U.S. 736, 745-46, 82 S.Ct. 1107, 1112-13, 8 L.Ed.2d 230 (1962). The Union opposed McClatchy's proposal and, as the Board

expressly found, the parties reached a bargaining impasse after "engag[ing] in in-depth, good faith negotiations." JA 314. After impasse McClatchy was entitled under established law to implement its proposal and to grant merit increases. Thus, in attempting to prevent implementation, the Board impermissible "exert[ed] its power to dictate the substantive terms of the collective bargaining agreement." *Colorado-Ute*, 939 F.2d at 1404 (citing *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103-04, 90 S.Ct. 821, 823-24, 25 L.Ed.2d 146 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02, 72 S.Ct. 824, 828, 96 L.Ed. 1027 (1952); and *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488, 80 S.Ct. 419, 426, 4 L.Ed.2d 454 (1960)). That the implementation here involved exercise of employer discretion should not subject McClatchy to any additional bargaining obligation. It is precisely this discretionary aspect of the proposal that stalled negotiation and led to impasse.

Given the clear precedent supporting the lawfulness of McClatchy's conduct, I find it more than merely "difficult to comprehend the Board's judgment in this case," as did Judge Edwards, Edwards Opinion at 1166, I find it impossible. For this reason, I would refuse to enforce the Board's unsupported (and unsupportable) decision and, I hope, lay this issue to rest. "There is no necessity to treat the case like a yo-yo," *Murray v. Buchanan*, 720 F.2d 689, 693 n. 6 (D.C.Cir.1983) (en banc) (MacKinnon, J., concurring specially), vainly remanding for the Board to concoct a different but equally unavailing rationale. Further, even were remand appropriate, I see no justification for this court to serve up for the Board "a smorgasbord of possible explanations of what the Board has done." *Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity v. NLRB*, 521 F.2d 885, 891 n. 9 (D.C.Cir. 1975). Notwithstanding the

erudition evident in my colleagues' opinions, I suggest that the Board's decision and supporting rationale should spring from its own specialized expertise which, after all, accounts in large part for the deference we accord its decisions. *See International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 719 (D.C.Cir.1987) ("[T]he very logic for deference to agency decisionmaking . . . is to place policy choices (within the limits permitted by statute) in the hands of delegated agents of Congress, subject to their expertise and experience.") (citation and emphasis omitted).

APPENDIX E — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 27, 1990

McClatchy Newspapers, Publisher of the Sacramento Bee and Northern California Newspaper Guild, Local 52. Case 20-CA-21429

September 27, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On March 24 and April 7, 1989, Administrative Law Judge David G. Heilbrun issued the attached decision and errata, respectively. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's decision only to the extent consistent with this Decision and Order.

We find, in agreement with the judge, that the Respondent's unilateral grant of merit pay increases to unit employees violated

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1. The Respondent has requested oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

Section 8(a)(5) and (1). Unlike the judge, however, our finding of a violation is based solely on the Board's analysis in *Colorado-Ute Electric Assn.*,[2] which issued subsequent to the judge's decision.

The undisputed facts show that the parties were signatories to a collective-bargaining agreement, effective April 14, 1984, to April 13, 1986, which, inter alia, for "minimum salaries," including a progressive wage scale and an agreed-on "publisher's merit pay plan," which encompassed discretionary merit pay increases on supervisory review for those employees who qualified by having 1 year of service at the top step of their respective wage scales. The Union's role with respect to merit pay was limited to comments and recommendations during the evaluation period and participation with employees in the appeal process. The Respondent's merit pay decisions were expressly excluded from the contractual grievance and arbitration procedure.

On February 13, 1986, the parties commenced negotiations for a successor contract. At the outset of bargaining, the Union sought a 25-percent across-the-board wage increase and discontinuance of merit pay, and the Respondent proposed that all compensation be based solely on merit, including full employer discretion to establish starting salaries, not subject to bargaining or the grievance and arbitration procedure.[3] The Union rejected the Respondent's total merit pay concept on the ground that it would undermine the Union's bargaining role as

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2. 295 NLRB 607 (1989)

3. Unlike the merit pay arrangement in the expiring contract, this proposal contained no provision for union participation in the evaluation and appeal processes.

to wages. After a second meeting, which ended without agreement as to wages, the parties concentrated on noneconomic issues during the next approximately 20 bargaining meetings. On November 11, 1986, they resumed bargaining about wages, although certain noneconomic issues remained unresolved.

At the November 11 meeting, the Respondent offered a revised merit pay proposal, setting the minimum guaranteed starting salary at the contract rate on April 15, 1985, and "grandfathering" existing employees at the top step of their respective wage scales of the expired contract. The Union rejected the revision because it regarded the proposed starting salary as meager and the "grandfather" feature, which would only affect about 10 percent of the unit employees, as inconsequential. The parties held to their respective positions on the wage issue at three subsequent meetings, the latter two in January and February 1987 with a Federal mediator in attendance. At that February meeting, the Respondent presented a "last, best, and final" offer containing the merit pay proposal with no further changes, and the meeting ended with the Union advising that it would recommend that its membership reject the final offer.

At the parties' last bargaining meeting on March 5, 1987, the Union reported that its members had rejected the final offer. Then the Union made counterproposals, including a return to the combined negotiated wage and merit pay arrangement in the expired contract. The Respondent caucused briefly, and returned with a counterproposal concerning unit exclusions. The Union declared this insufficient for an overall agreement; the Respondent's representative replied that he would do what was "necessary" under the circumstances; and the meeting ended with bargaining still deadlocked on the issue of wages. The

next day, the Respondent posted its merit pay plan along with other terms and conditions of employment contained in its final offer. Subsequently, the Respondent granted merit pay increases to some unit employees without prior discussion with the Union.

The judge, initially, found that the Respondent had violated Section 8(a)(5) and (1) by implementing merit pay in the absence of impasse. He found an insufficient showing that further bargaining on and after March 5, 1987, would not have been productive. Specifically, the judge noted the Union's major revisions to its union-security proposals on that date, as well as its demonstrated willingness to consider all the Respondent's proposals other than merit pay. Contrary to the judge, we conclude that the evidence in this case is most consistent with the finding that the parties had engaged in in-depth, good-faith negotiations, and shared a contemporaneous understanding that they had reached an impasse in bargaining on the crucial issue of negotiated wages versus merit pay.[4] Moreover, we find merit in the Respondent's assertion that the complaint and answer did not join issue over whether the parties had reached a bargaining impasse, but that the General Counsel's theory of litigation of the complaint was that the Respondent, as the Respondent admitted, had insisted to impasse over its merit pay plan and that the plan was a nonmandatory subject of bargaining.[5] As a consequence, we find that the Respondent

4. Cf. *Sacramento Union*, 291 NLRB *552* In. 11 (1988).

5. Contrary to the judge, who agreed with the General Counsels theory of the case, we do not find evidence of bad faith from the contents of the Respondent's merit pay proposal, *Reichhold Chemicals, 288* NLRB 69 (1988). Nor do we find evidence of bad faith from its insistence to impasse on the proposal, as discussed below. (It was in connection with those findings that the judge concluded that the parties did not reach lawful impasse in this case.)

had no notice of any affirmative burden on it to prove a bargaining impasse, and that the issue of there in fact being no impasse—contrary to the complaint and answer— was not fully litigated at the hearing. In any event, we are satisfied that the evidence warrants a finding that the parties reached a bargaining impasse on March 5, 1987, and we shall reverse and dismiss this 8(a)(5) and (1) finding by the judge.

The judge further found an additional 8(a)(5) and (1) violation, in Errata,[6] based on the Respondent's insistence on inclusion of a permissive subject of bargaining, i.e., its merit pay proposal, as a condition of entering into any agreement. The Board, however, after the judge issued his decision, held that merit pay is a mandatory bargaining subject on which a party may lawfully insist to impasse.[7] We shall, therefore, reverse the judge and dismiss this complaint allegation.

The Respondent argues in its exceptions that, as we have found above, it was privileged to insist to impasse on merit pay and then to implement merit pay unilaterally after reaching a bargaining impasse. We find the Respondent's position on the second point lacking in merit for the reasons explained below.

The Board in *Colorado-Ute*, in addition to holding that merit pay is a mandatory subject of bargaining, also found that

6. In *Wilco Business Forms*, 280 NLRB 1336 (1986), the Board held that administrative law judges are authorized to issue postdecisional errata only to correct material typographical errors, but not to change matters of substance, such as findings on the merits. Although we dismiss this 8(a)(5) and (1) violation on the merits, we also find that the judge has exceeded his authority in this case by issuing Errata, which find an additional 8(a)(5) and (1) violation and thereby change the substance of his decision. Accordingly, we strike the Errata.

7. *Colorado-Ute*, above, fn. 4.

Section 8(d) encompasses a duty to bargain over the procedures and criteria for granting merit increases to employees, citing *NLRB v. Katz*, 369 U.S. 736, 746-747 (1962). Thus, to the extent that implementation of a merit pay program also involves discretion in determining the amounts or timing of increases, it is a matter for consultation with the bargaining agent. *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973). The Respondent's proposal in this case, like the one in *Colorado-Ute*,[8] set no criteria for the amounts or timing of merit increases, and failed to provide for union participation either in the initial determination of merit increases granted to particular employees or afterwards through the contractual grievance procedure. Thus, the proposal, by providing for unlimited management discretion over the determination of timing and amounts of merit increases, was in reality seeking the Union's waiver of its statutory right to be consulted over those matters under Section 8(a)(5) and (1) of the Act.

The Union did not agree to the Respondent's merit pay proposal and, in fact, expressed its opposition to it for the very reason that it would completely exclude the Union's

8. The Respondent asserts that the instant case is factually distinguishable from *Colorado-Ute* insofar as that case, unlike this one, involved other independent 8(a)(1) violations and an overall allegation of surface bargaining and occurred in the context of bargaining pursuant to a wage reopener rather than full contract negotiations. We are satisfied that those differences are not materially relevant, and we conclude that the analysis set forth in *Colorado-Ute* is applicable to this case.

Although Chairman Stephens did not join the panel majority opinion in *Colorado-Ute* (and still has reservations concerning some of its reasoning), for institutional reasons he concurs in finding that under that precedent the Respondent's unilateral implementation of a new, broadly discretionary merit wage proposal violated its duty to bargain with the Union.

participation in determining merit pay increases. The Respondent was unable during negotiations to secure the Union's waiver of its right to bargain over the timing and amounts of merit pay increases. Nor does the parties' bargaining history establish a waiver.[9] Consequently, the Respondent was free to insist to impasse that the Union agree to waive its statutory rights, but was not privileged to proceed with implementation after impasse as though it had successfully secured the Union's waiver. Accordingly, the Respondent had a lawful right after impasse unilaterally to consider employees for merit increases; however, as announced in *Colorado-Ute*, supra, it still had a duty to bargain with the Union about the timing and amounts of the merit increases prior to granting any such increases.

The Respondent did not consult the Union beforehand but merely presented the Union with the results of its merit reviews after the increases had already been granted. We therefore find that the Respondent's failure to bargain with the Union about the timing and amounts of merit increases constitutes a violation of Section 8(a)(5) and (1) of the Act.

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9. The Board requires that a waiver of bargaining rights under Sec. 8(a)(5) not be lightly inferred but be clear and unmistakable. *Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enfd. 702 F.2d 624 (6th Cir. 1983). The Respondent argues that the Union effectively waived its statutory right, by consenting to a substantially similar merit pay plan in the now expired contract. We disagree. Even assuming arguendo that the practices established by the merit pay provisions of the 1984-1986 agreement survived contract expiration, we find the Respondent's defense meritless because, as noted in fn. 3 supra, the proposal on which the Respondent was insisting was not identical to those existing practices.

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AMENDED CONCLUSIONS OF LAW

1. Substitute the following for renumbered Conclusion of Law 5.

"5. By unilaterally granting merit wage increases to employees without offering to bargain with the Union about the timing and amounts of the increases, the Respondent violated Section 8(a)(5) and (1) of the Act."

2. Add the following as Conclusion of Law 7.

"7. The Respondent has not otherwise violated the Act."

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to bargain with the Union about the timing and amounts of employee merit increases. Further, we shall also order the Respondent, on the Union's request, to cancel the wage increases unlawfully granted to employees through the Respondent's unilateral action. Nothing in our Order, however, should be construed as requiring the Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

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ORDER

The National Labor Relations Board orders that the Respondent, McClatchy Newspapers, Publisher of The Sacramento Bee, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting merit wage increases to employees without bargaining with Northern California Newspaper Guild, Local 52 about the timing and amounts of increases.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Northern California Newspaper Guild, Local 52 about the timing and amounts of employee merit wages increases prior to granting any merit increases.

(b) If the Union requests, cancel wage increases unlawfully granted to employees through the Respondent's unilateral action.

(c) Post at its Sacramento, California facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on

10. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board", shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT grant merit wage increases to you without offering to bargain with Northern California Newspaper Guild, Local 52 about the timing and amounts of the increases.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union about the timing and amounts of employee wage increases.

WE WILL, if the Union requests, cancel wage increases unlawfully granted to employees through our unilateral action.

McCLATCHY NEWSPAPERS, PUBLISHERS
OF THE SACRAMENTO BEE

* * *

Appendix E

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Sacramento, California, on November 15 and 16, 1988. The charge was filed by Northern California Newspaper Guild, Local 52 (the Union), on September 2, 1987, and the complaint was issued July 29, 1988.[1] The primary issue is whether McClatchy Newspapers, Publisher of the Sacramento Bee (Respondent) bargained to impasse and then implemented a merit pay system without having afforded the Union adequate opportunity to negotiate and bargain as exclusive representative of employees, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

On the entire record,[2] including my observation of the demeanor of witnesses, and after consideration of briefs filed by the parties, I make the following

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1. The case opened as a matter consolidated with case 2-CA-22044. In proceeding of record the parties reached a non-Board settlement satisfactory to General Counsel, and on that basis case 2-CA-22044 was severed and remanded to the Regional Director upon an approval of withdrawal of the charge and requested dismissal of the complaint.

2. General Counsel's unopposed motion to correct transcript with respect to certain names, as contained in her brief dated January 6, 1989, is granted; however the corrected names are not found exactly at the referenced transcript passages. Additionally, on my own motion, I correct the transcript at p. 172, L. 21 by changing "I think" to "I don't think."

Appendix E

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with its office and place of business in Sacramento, California, where it has been engaged in the publication of a daily newspaper. During calendar year 1987 in the course and conduct of such business operations Respondent derived gross revenues in excess of $200,000 while holding membership in or subscribing to various interstate news services, publishing variously nationally syndicated features and advertising various nationally sold products. During the same annual period Respondent in the further course and conduct of its business operations purchased and received products, goods and materials valued in excess of $5000 which originated from points outside the State of California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. THE ALLEGED UNFAIR LABOR PRACTICES

Outline of the Situation

The Employer is a major daily newspaper of California's state capital. The parties have had a collective-bargaining relationship for nearly 50 years, for a unit now of several hundred employees comprising editorial, advertising, and PBX telephone switchboard personnel.

The most recent contract was one of 2 years duration expiring April 13, 1986. Former Guild Local 92, the union

party to that contract, has by merger occurring around 1985 transformed to the present Northern California Newspaper Guild, Local 52.

New contract bargaining commenced in February 1986 and ran to March 1987 at which time Respondent implemented a certain compensation plan for unit employees based on asserted impasse as to its resolutely final contract offer.

Principal Facts

The expiring contract contained modified union-security provisions and those for checkoff and remittance of union dues. The subject of compensation was covered in section 5 with the heading "minimum salaries," embodying an opening section as paragraph 5.0 in which the agreed-upon "publisher's merit pay plan" was set forth. This provided for discretionary merit pay increases upon supervisory review of those having achieved their top minimum salary in a classification conditioned on 1 year of service. The Union was entitled to comment and recommend in terms of the general evaluation process, and to "participate with [an] employee in the appeal process." However Respondent's merit pay decisions were expressly excluded from the established grievance and arbitration procedure of the contract.

Negotiations opened with a session on February 13, 1986. The Union's chief spokesperson was Jerry Rocker, its administrative officer. Travis Brown, the assistant administrative officer and now acting administrative officer following Rocker's departure, chaired the bargaining committee, a group of several other individuals at this session and ordinarily at those to follow. Respondent was chiefly represented by former Operations

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Director Fuller Cowell, heading a small bargaining committee of persons also at regular attendance throughout.

The parties exchanged comprehensive written proposals at the outset. As to compensation the Union sought generally a 25-percent wage increase and discontinuance of merit pay, while Respondent, in an opposite vein, proposed that merit pay concepts and full employer discretion to establish starting salaries would be the sole basis of employee compensation. These divergent proposals were argued over at the first session, one in which respective reactions of the parties to the entire opening proposal of the other occurred.

Discussion on the compensation subject continued at the second negotiating session of February 25, 1986, with Rocker making dramatic statements characterizing Respondent's wholly merit pay approach as one that would completely undermine the Union's representational role. Cowell spoke in support of the proposal, noting that already 75 percent of the unit was on merit pay and that Respondent desired to have this concept regulate all aspects of employee compensation. At the conclusion of this meeting a consensus evolved that the parties should set aside the subject of compensation and concentrate on noneconomics in the bargaining sessions to follow. This actually transpired over the course of nearly 20 meetings thereafter in 1986, except for Rocker's brief, inconclusive effort to reopen the subject during a meeting in April.

At the session on November 11, 1986, the parties returned to the economic subject of compensation and a modification of Respondent's original proposal was presented. The essence of a page-long document was (1) to propose, after combining certain of the existing classifications, that minimum starting

salaries as previously applying on April 15, 1985, would obtain with the new contract, except for two different levels applicable to reporters only, and (2) that *current* employees below maximum pay level would be "grandfathered" to the experience increment increases of the expired contract. Here the Union's reaction was dismay over the assertedly meager amount of guaranteed starting pay for any *newly* hired employees to whom the proposal pertained, and an argument that generally upwards of 90 percent of current employees were "maxed out" at the top pay level making the "grandfather" feature nearly meaningless. Cowell reasoned for Respondent that merit pay was pervasively effective among employees of the unit, seemed to be working fairly, and was a desirable business approach to labor cost of operations.

The deadlock on this issue continued into the next meeting on December 1, 1986, on which occasion discussion of commission pay proposals led to reopening the topic of merit pay. Rocker and Cowell debated its validity again, with respective positions remaining adamant on the point. The prospect of impasse in negotiations was raised conversationally; however, Cowell suggested the parties now turn to mediation assistance and Rocker agreed to the technique.

The parties next convened on January 18, 1987, and the designated Federal mediator separated them for this session. Nothing significant resulted at this time and another session was set for February 27, 1987, with the mediator. Here after separated discussions with the mediator, the parties assembled and Respondent presented certain minor changes in a "last, best and final" contract offer. The merit pay proposal was unchanged, and other open issues including union security, checkoff, and management rights remained in dispute. The meeting concluded with advice by Rocker that a membership

vote would be taken on Respondent's offer, with the union bargaining committee planning to unanimously recommend rejection.

The last meeting in the course of bargaining occurred on March 5, 1987. As predictably likely the unit membership had rejected Respondent's final offer, and from this the Union made certain counteroffers in the nature of bargaining movement on issues including their own proposal as to compensation. Cowell caucused briefly with his committee, and returned with a minor counterproposal on the side issue of unit exclusions. The Union declared this was insufficient to achieve an overall agreement, and Cowell reportedly replied to this that he would do what was "necessary" under existing circumstances. Cowell's version essentially corresponds in that he recalled making positive comment about the effort earnestly expended through negotiations, but that the deadlock arising early on had persisted to the very end. Respondent promptly posted its new conditions of employment on the basis that a bargaining impasse warranted such employer action, and unilaterally determined starting and advancing salary amounts for unit employees hired thereafter.

Contentions

General Counsel and the Union each contend that the extraordinary impact of Respondent's merit pay proposal in a unit of this composition is a bargaining subject of permissive character only, and one that cannot justify a declaration of impasse without commission of a per se bargaining violation of the Act. Additionally, the Union contends that circumstances of the case make Respondent's insistence on its merit pay proposal an instance of bad-faith bargaining.

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Respondent contends that its merit pay proposal is a mandatory subject for bargaining under applicable doctrine, and that it would not jeopardize the Union's representational role as any waiver of a right to represent employees. Respondent enlarges on this basic contention by noting that in any event the parties were at odds on significant subjects of union security and dues checkoff, both of which were independently susceptible of supporting the claimed condition of impasse following the March 5, 1987 session.

Analysis

All parties point to *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), as the benchmark ruling in terms of issues here. In *Borg-Warner* the Court held that insistence to impasse is available to a party only with respect to a mandatory subject of bargaining, while comparable insistence to impasse on a permissive subject would violate the statutory duty to bargain in good faith. *Borg-Warner,* supra at 349. In the vigorously argued and thoroughly briefed presentations of the case after this point of departure, the parties inject several esoteric, or at least highly theoretical notions of how this configuration of bargaining should be viewed.

General Counsel advances the central point of permissive/nonmandatory subject matters, while contending variously that Respondent exhibited "rigidity" indicative of bad faith, that the employer's scenario would muzzle employees relative to their income aspirations or chill effective protest, and that any employer claim of waiver of representation rights by this labor organization relative to compensation is not well-founded.

The Union argues that this claimedly permissive subject pressed by Respondent cannot be allowed as a basis for impasse,

and alternatively that Respondent's stout defense of its new approach to employee compensation constituted actionable bad-faith bargaining.

In opposition Respondent points to the residual of negotiated compensation patterns as contained in its final proposal, and that relatedly the merit pay feature of the expired contract legitimized this subject matter in the more extreme form presented by these negotiations.

Beyond such emphasis in these arguments on the case, the Union and Respondent also draw further significance from characterizations and rhetoric of the communication medium "Bee Sting," as this union publication progressively followed contract bargaining and commented stridently about the nature, tone, and apparent motivation of and for the employer's proposals. I do not see a need for the extreme depth of reasoning given this situation by the parties. Rather, it is established to my satisfaction that Respondent has cleverly constructed a wage proposal that essentially deprives the Union of any meaningful role in some mutually hammered out formula, generally guaranteeing income amounts to employees, while leaving only the shakiest semblance of contractually assured compensation levels.

The Union attacks Respondent's proposed salary base for those to be newly hired at future times in the classifications. I do not see this component of the proposal as one facet of an unlawful bargaining posture in the per se sense. Rather it fostered mainly an adversarial distress over the meagerness of salary amounts offered, particularly when tying them to an expired contract in an almost taunting way. However concessionary bargaining is increasingly common, and pay

cut proposals arise repeatedly throughout the private sector. The vice in Respondent's proposal is the radically more significant intention from separating the Union from any input regarding employee income.

It is aptly quoted that:

> [Employer] insistence that the Union agree to exclude from the grievance procedure so all pervading and important an aspect of the employment relationship as the rates of pay of the bulk of the employees was to insist that the employees give up one of the most significant parts of what Congress sought to accomplish in enacting Section 8(a)(5). This, also was to negate the basic principles of collective bargaining and was inconsistent with any good-faith intention on the part of Tex-Tan to reach an agreement with the Union as described in Section 8(d). *Tex-Tan Welhausen,* 172 NLRB 851 (1968).

This notion is of a labor organization's privileged entitlement, or even duty, to negotiate avidly with respect to employee compensation both as a measure of services valuable to the employer and as an apportionment of the spread of economic features in the particular workplace. In the former sense this function reflects the labor organization's interest, if not expertise, in proposing appropriate pay levels for skill, experience, or the business contribution of its represented members. In the latter sense it is collaboratively institutionalized and judgmental evaluations, researched, consensus-oriented or instinctive, that permit and require a key role while participating effectively in the distribution of economic benefits throughout a bargaining unit.

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The entitlement is not of an abstract or questionable basis. In authoritative literature it was written:

> When employer and union meet at the negotiating table they are generally engaging in a serious economic confrontation. The ultimate joint product will usually post the employer more money. Negotiating a general wage increase or incorporating a special increase in the rates for skilled workers or agreeing substantial additions to the present complex of money fringe benefits—any and all of these will boost the price of labor as a factor [operations]. Davey, *Contemporary Collective Bargaining*, (3d ed. 1972) at 253 (Prentice-Hall, Inc).
>
> . . . . .
>
> Of crucial importance to understanding why *unions behave like unions* rather than as cost-conscious employers might wish them to behave is an appreciation of the fact that union leaders are not sellers of a commodity (labor) in the usual sense. Union leaders *represent* groups of employees who have selected or designated them to perform the representation function. Union leaders are *agents* of the employees they represent. More importantly, both the local union leadership and the national union leaders are *elected agents*. As agents who must satisfy their clients, union leaders cannot act always as economic men. Over any period of time the union leader must satisfy the needs and aspirations of his constituency—the membership—

> or face the prospect of losing power. Union leadership behavior and demands in negotiations, therefore, are frequently not as businesslike or as responsible as employers and economists might like. [Davey, *Contemporary Collective Bargaining*, supra at 257.]

It is also to be remembered that any contrary view would conflict with the explicit and highly implicit meaning of the court in barring employers from direct dealing with employees in derogation of a union by the rationale in *Borg-Warner*. The Court wrote:

> Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether . . . a subject . . . [is or is not] within that definition. *[Borg-Warner Corp.*, supra at 349.]

Even more directly the Board has held:

> [P]erhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act. Because so substantial a portion of the remaining aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the

> jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions—the establishment and maintenance of a viable agreement on wages. [*Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973).]

More expansively it has also been written in *Alba-Waldensian, Inc.*, 167 NLRB 695, 696, enfd. 404 F.2d 1370 (4th Cir. 1968), that an employer's "insistence upon retaining the right to unilaterally to control during the contract term an item as vital to the agreement as wages appears . . . the clearest manifestation of bad faith." See also *United Contractors*, 244 NLRB 72 (1979).

Here the merit pay proposal, pervasive, nearly all-inclusive, and dominating as to perspective labor costs of publication, was presentedly severed from any recourse by the Union to the grievance and arbitration mechanism. Plainly, the grievance and arbitration avenue of relief as to contract disputes over compensation is a standard pillar of any respectable collective-bargaining relationship. Indeed the introductory remarks concerning learned papers regarding wage arbitration keying to the term "work measurement," noted:

> The employer and the union have established this relationship of work and pay by negotiation and practice; it is the function of the arbitrator to decide the issues to confirm and continue the accepted ratio. . . . an incentive issue [is] a dispute and stipulated question that requires for determination

> the arbitrator's knowledgeable recognition and analysis, and even the actual performance, of work measurement. By this term, work measurement, [there is included] the many different means of determination of work standards by which worker productivity is rated—means ranging from the most elementary intuitive judgment to the highly sophisticated predetermined standard-time techniques. [*Proceedings of the Thirty-Second Annual Meeting—National Academy of Arbitrators, Arbitration of Subcontracting and Wage Incentive Disputes: 3 Perspectives*, page 92, the Bureau of National Affairs, Inc. (1979).]

Respondent's final, modified proposal for a new contract provision under Section 5 in which unrestricted evaluation by management would be the sole determinant of employee earnings, tempered only by the barest concession to a growingly more minute segment of the bargaining unit left with experience level increases in pay, is persuasively enough the sort of permissive subject which, although legitimate of introduction in a course of bargaining, is illegitimate to adhere to until it creates a major deadlock in the negotiation process, or one that cannot really be separated from other still-unresolved issues. On this basis I hold that any impasse existing between the parties was so influenced by Respondent's adamant insistence on its near-universal merit pay plan, that the impasse became one unlawfully created by the indomitable presence of this permissive subject injected, embraced and resolutely rallied behind by an eager employer. *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enfd. 733 F.2d 872 (11th Cir. 1984).

Alternatively, there is insufficient showing that further bargaining might not have been productive as matters stood on

March 5, 1987. The Union had just made major revisions in its package of proposals, particularly with reference to union security and other important subjects, and had generally demonstrated a willingness to weigh and consider all prospects of overall contract agreements save only the alarming, novel and emasculating employer demand for superseding merit pay.[3] An employer is not free to so cavalierly approach the bargaining process. This holding squares with recent rationale of the Board to the effect that:

> [The] employer was not free to implement its final contract offer because no breakdown in the overall negotiations had occurred. The Board stated that it was not suggesting that impasse on a single critical issue cannot in some circumstances create a deadlock in the entire bargaining process, but that the record in this case failed to establish, that when the employer declared impasse on Guild security, further good-faith bargaining would have been futile. [*Sacramento Union,* 291 NLRB 552 (1988).]

As also recently decided in *D.C. Liquor Wholesalers,* 292 NLRB 1234 (1989). The instant case involved a failure to exhaust "all reasonable expectations of compromise"; however, I agree with

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3. I credit testimony of Brown to the effect that any utterances by Rocker during the December 1, 1986 bargaining session to the effect that the Union would tolerate an impasse declaration and not make an unfair labor practice challenge to it, plus contextual remarks on other occasions, were sarcastic in meaning, and mainly theatrical in delivery, not in any instance to be taken as a serious position statement by listeners of reasonable prudence and understanding. I discredit as unreliable and of defective recall the contrary assertion of Cowell by which he ascribed significance to such remarks. See *Television Artists AFTRA v. NLRB,* 395 F.2d 622, 628 (D.C. Cir. 1968).

the dissenting view in that fact situation that a technical violation of the Act, not one showing mere surface bargaining, had occurred.

Respondent disputes the validity of associating either *Tex-Tan Welhausen* and *Alba-Waldensian, Inc.* to the opposition's rationale. I note this contention, but believe both cases are properly advanced to support, indirectly at least, the view that under the Act an insistence on near-unilateral control over compensation is tantamount to unlawful bargaining on a permissive subject. Further, Respondent denies that its proposal would lead to a fundamental waiver of the Union's right to represent employees. However the argument made in support of this point is unrealistic. There would be no true "input" on the subject by the Union, nor would the situation be analogous to an allowable "wage freeze," but instead it would fundamentally take away, thus effecting a waiver of status, the Union's statutorily protected rule as to this subject in negotiations. For this reason the implementation of terms, here commonly known as "posting of conditions," was unjustified by the facts and even within case authority cited by Respondent an unfair labor practice under the Act. Cf. *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Appendix E

All employees employed by Respondent at its Sacramento, California facility, who were covered by the 1984-1986 collective bargaining agreement between Respondent and the Central California Newspaper Guild, Local 92; excluding all other employees, guards and supervisors as defined by the Act.

4. At all times material, the Charging Party has been the exclusive representative for purposes of collective bargaining of the employees in the above-described appropriate unit within the meaning of Section 9(a) of the Act.

5. By declaring negotiations at an impasse in furtherance and support of its permissive subject of bargaining that the Charging Party agree to a proposed merit pay system under which employer determinations would not be subject to a contractual grievance and arbitration procedure, the Respondent refused to bargain collectively and in good faith with the Charging Party in violation of Section 8(a)(5) and (1) of the Act.

6. By unilaterally implementing its final contract offer on or about March 5, 1987, thereby effecting changes in unit employees' wages and terms and conditions of employment, at a time when no impasse in bargaining with the Charging Party had occurred, the Respondent refused to bargain collectively with the Charging Party in violation of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Appendix E

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unilaterally implemented its final contract offer at a time when no impasse had occurred, I shall order the Respondent, on request, to bargain collectively in good faith with the Union on terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement. Specifically, having found that Respondent insisted to impasse on its permissive subject for bargaining respecting a new merit pay system, I shall order that it cease and desist from furthering and supporting this proposal in such manner.

I shall order Respondent, if requested by the Union, to reinstitute the wages and terms and conditions of employment that existed before its unlawful changes, and to make whole unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 836 (1970), with interest thereon to be computed in the manner set forth in *New Horizon for the Retarded*.[4]

Finally, to the extent that the unlawful unilateral changes implemented by Respondent may have improved the terms and

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4. 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

conditions of employment of unit employees, I note that no provision of my Order shall in any way be construed as requiring the Respondent to revoke such improvements.

[Recommended Order omitted from publication.]